

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

**ALEJANDRO G LOPEZ**  
Claimant

**APPEAL NO. 06A-UI-11671-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**LENNOX MFG INC**  
Employer

**OC: 11/05/06 R: 02  
Claimant: Appellant (2)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct  
871 IAC 24.32(7) – Excessive Unexcused Absences

**STATEMENT OF THE CASE:**

Alejandro Lopez filed a timely appeal from the December 5, 2006, reference 02, decision that denied benefits. After due notice was issued, a hearing was held on December 21, 2006. Mr. Lopez participated. Bruce Martin, Labor Relations Manager, represented the employer. Employer's Exhibits One through Six were received into evidence.

**ISSUE:**

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies him for unemployment insurance benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Alejandro Lopez was employed by Lennox Manufacturing as a full-time production employee/assembler from May 16, 2005 until November 6, 2006, when Labor Relations Manager Bruce Martin suspended him pending a decision regarding termination of the employment. On November 15, Mr. Martin mailed a letter to Mr. Lopez discharging him from the employment. The employer based its decision to discharge Mr. Lopez on the fact that he had received four "active warning tickets" in an 18-month period. All of the warning tickets were issued for "excessive absence." The employer has a written attendance policy that is part of a collective bargaining agreement. Under the policy, Mr. Lopez was required to telephone his immediate supervisor, Scott Thompson, prior to the scheduled start of the shift if he needed to be absent. Mr. Lopez was required to leave a detailed voice message regarding the nature of the absence. Though the employer's attendance policy is a no-fault policy, the employer does track the reason for the absence. In issuing warning tickets to Mr. Lopez for attendance, the employer did not consider whether the absence that prompted the warning ticket was for illness properly reported or something else.

The final absence that prompted the suspension and discharge occurred on November 3, 2006, when Mr. Lopez was absent due to personal business. Mr. Lopez's next most recent absence, for something other than illness properly reported to the employer, had occurred on May 1,

when Mr. Lopez was again absent due to personal business. Mr. Lopez had two other similar absences on September 17, 2005 and March 20, 2006. All other absences were for illness properly reported to the employer.

**REASONING AND CONCLUSIONS OF LAW:**

The question is whether the evidence in the record establishes that Mr. Lopez was discharged for misconduct in connection with the employment. It does not.

Iowa Code section 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate

the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

Regardless of how the employer characterized the context of the discharge, warning tickets versus attendance, this was a discharge based exclusively on attendance. In order for Mr. Lopez's absences to constitute misconduct that would disqualify him from receiving unemployment insurance benefits, the evidence must establish that his *unexcused* absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

The evidence in the record establishes that the final absence on November 3 was an unexcused absence. Mr. Lopez was unable to provide any specific information regarding this absence. The employer recorded the absence as being based on personal business, and the weight of the evidence indicates the absence was for personal business. However, Mr. Lopez's next most recent absence, for something other than illness properly reported to the employer, occurred a full six months prior to the final absence that prompted his discharge. Mr. Lopez's unexcused absences were not excessive. The evidence provides no evidence of any other form of misconduct.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Lopez was discharged for no disqualifying reason. Accordingly, Mr. Lopez is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Lopez.

**DECISION:**

The Agency representative's December 5, 2006, reference 02, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/kjw