

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LARRY D FELTMAN
Claimant

APPEAL NO. 10A-UI-06835-AT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ADVANCE BRANDS LLC
Employer

OC: 04/04/10
Claimant: Appellant (2)

Section 96.5-2-a – Discharge
871 IAC 24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

Larry D. Feltman filed a timely appeal from an unemployment insurance decision dated April 28, 2010, reference 01, that disqualified him for benefits. Due notice was issued for a telephone hearing to be held June 25, 2010. With the consent of the parties, it was held instead on June 28, 2010 with Mr. Feltman participating. Human Resources Representative Kathy Waterman and Sanitation Supervisor Scott Alexander participated for the employer, Advance Brands, LLC. Employer Exhibits Three, Five, and Six and Claimant Exhibit A were admitted into evidence.

ISSUE:

Was the claimant discharged for misconduct in connection with his employment?

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: Larry D. Feltman was employed by Advance Brands, LLC from April 14, 2008 until he was discharged April 1, 2010. He last worked in the sanitation department. Mr. Feltman was absent due to illness on March 23, 24, and 25, 2010. On each occasion he spoke with his supervisor, Scott Alexander. During the last conversation, Mr. Feltman told Mr. Alexander that he still was running a fever of 102 degrees. Mr. Alexander reminded Mr. Feltman that he must return to work with a doctor's excuse. Mr. Feltman misconstrued Mr. Alexander's statement as an indication that he need not continue calling in every day. As a result, Mr. Feltman was absent due to illness on March 26, 2010. He returned to work with a doctor's statement. The employer thought that the statement was insufficient because it did not specifically say that Mr. Feltman should be excused. He returned with a second excuse, this one specifying that he should be excused from work through March 26, 2010. He was discharged nonetheless because he had not specifically spoken to Mr. Alexander before his shift on March 26, 2010. Mr. Feltman had been absent due to illness on prior occasions and had followed company policy concerning notification. He had also been absent on February 11, 2010 without contact.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in this record establishes that the claimant was discharged for disqualifying misconduct. 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.

The employer has the burden of proof. See Iowa Code section 96.6-2. Among the elements it must prove is that the final incident leading directly to the decision to discharge was a current act of misconduct. See 871 IAC 24.32(8). The final incident was an act of omission, Mr. Feltman's failure to speak directly to Mr. Alexander prior to his absence on March 26, 2010. It is clear that Mr. Feltman did not strictly follow company notification procedures. Nevertheless, it also shows substantial compliance with those procedures. He had spoken with Mr. Alexander on the prior three days. He submitted a total of two doctor's notes concerning his absences. The note excusing him from work on March 26, 2010 persuades the administrative law judge that Mr. Feltman was, in fact, ill on that day.

The administrative law judge notes that Mr. Alexander did not deny that Mr. Feltman had said on the 25th that he was still running a fever of 102 degrees. He testified merely that he did not recall the conversation. Given the various responsibilities of a supervisor, the administrative law judge does not find it surprising that an employee in Mr. Feltman's circumstances would have the clearer recollection of the conversation. Given the history of calls on the previous three days and the documentation, the administrative law judge concludes that Mr. Feltman substantially complied with the company's policy and properly reported his absences to the company. Since the final incident leading to discharge was not a current act of misconduct, no disqualification may be imposed.

DECISION:

The unemployment insurance decision dated April 28, 2010, reference 01, is reversed. The claimant is entitled to receive unemployment insurance benefits, provided he is otherwise eligible.

Dan Anderson
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs