

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

FERNANDO VILLANUEVA
Claimant

APPEAL NO. 10A-UI-11209-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BURKE MARKETING CORPORATION
Employer

OC: 07/11/10
Claimant: Appellant (2-R)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Fernando Villanueva filed a timely appeal from the August 5, 2010, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on September 27, 2010. Mr. Villanueva did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Shelli Seibert, Human Resources Generalist, represented the employer. Exhibits One through Six were received into evidence.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Fernando Villanueva was employed by Burke Marketing Corporation as a full-time grind room laborer from September 2009 until June 15, 2010, when the employer discharged him for attendance. The final absence that factored into the discharge occurred on June 15, 2010, when Mr. Villanueva was absent due to illness. Mr. Villanueva properly reported the absence by contacting the employer prior to the scheduled start of his shift. The next most recent absence that factored in the discharge occurred on June 7, 2010, when Mr. Villanueva was again absent due to illness and properly reported the absence to the employer. The next most recent absence had occurred on May 26, 2010, when Mr. Villanueva was late to work. The employer discharged Mr. Villanueva when he accrued sufficient attendance points under the employer's attendance policy to be subject to discharge from the employment.

REASONING AND CONCLUSIONS OF LAW:

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). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's *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 fails to establish a current act of misconduct. The evidence indicates that the final two absences on June 7 and 15, 2010 were both due to illness properly reported to the employer. Both were excused absences under the applicable law and cannot serve as the basis for disqualifying Mr. Villanueva for unemployment insurance benefits. The next most recent absence had been on May 26, 2010, some 20 days prior to the final excused absence that triggered the discharge. The May 26, 2010, along with any prior absences, would not qualify as a "current act" for unemployment insurance purposes.

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

This matter will be remanded to the Claims Division for determination of whether the claimant has been able to work and available for work since he established his claim for benefits. The Claims Division should also review the claimant's group code classification (5) to determine whether it is accurate. The nature of the claimant's employment with the above employer would suggest the claimant is a group 2 claimant.

DECISION:

The Agency representative's August 5, 2010, reference 01, 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.

This matter will be remanded to the Claims Division for determination of whether the claimant has been able to work and available for work since he established his claim for benefits. The Claims Division should also review the claimant's group code classification (5) to determine whether it is accurate.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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