

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

HEVER ARELLANES
Claimant

APPEAL NO. 08A-UI-04467-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT & COMPANY
Employer

OC: 12/02/07 R: 02
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Hever Arellanes filed a timely appeal from the May 6, 2008, reference 02, decision that denied benefits. After due notice was issued, a hearing was held on May 22, 2008. Mr. Arellanes participated. The employer failed to respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. The administrative law judge notes that the employer also failed to respond to the hearing notice for a second hearing scheduled for the same day but concerning a different claimant. See Appeal Number 08A-UI-04461-JTT. Exhibit A was received into evidence. The hearing in this matter was consolidated with the hearing in Appeal Number 08A-UI-04468-JTT.

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: Hever Arellanes had worked for Swift & Company on two separate occasions. Mr. Arellanes commenced his most recent period of employment on December 10, 2007 and worked as a full-time production worker in the butt trimming area until March 27, 2008, when a human resources representative discharged him for attendance.

On Saturday, March 8, 2008, Mr. Arellanes suffered a closed head injury when he was the victim of a domestic abuse assault. The assault occurred at Mr. Arellanes' home. Mr. Arellanes received medical treatment that included approximately a dozen staples. On Monday, March 10, Mr. Arellanes properly notified the employer that he would be absent due to illness. The employer's policy required that employees call a designated number at least 30 minutes prior to the scheduled start of the shift and leave a message if they needed to be absent. In the afternoon of March 10, Mr. Arellanes spoke with a human resources representative, who approved an absence due to illness on March 11. On March 12, Mr. Arellanes appeared for work at the scheduled start of his shift. Mr. Arellanes performed his duties for approximately 45 minutes before he went to the company nurse. Mr. Arellanes had been feeling nauseous and sensitive to the bright lighting on the cut floor. The nurse contacted Mr. Arellanes' sister-in-law, who transported Mr. Arellanes to a doctor's office, where Mr. Arellanes made an appointment

for the afternoon of March 13. This was the earliest available appointment. On March 13, Mr. Arellanes properly notified the employer that he would be absent due to illness.

Mr. Arellanes saw the doctor on March 13 and reported dizziness, nausea, a throbbing head, sensations down his spine, blurred vision, and light sensitivity. Mr. Arellanes told the doctor that his work duties involved wielding a mechanized "whizzer" knife. The doctor recommended that Mr. Arellanes refrain from driving, or operate power equipment, including the knife he used at work. The doctor provided a note that excused Mr. Arellanes from work until March 27. The doctor directed Mr. Arellanes to make a follow-up appointment to see the doctor in a couple weeks.

On March 14, Mr. Arellanes properly notified the employer that he would be absent due to illness. Later that day, Mr. Arellanes contacted a human resources representative and provided the information he had received from the doctor.

Despite the doctor's recommendation that Mr. Arellanes not work until March 27, Mr. Arellanes reported for work on Monday, March 17 and worked his entire shifts for that week. On March 24 and 25, Mr. Arellanes properly notified the employer that he would be absent from work due to illness.

On March 26, Mr. Arellanes was absent from work and properly notified the employer.

On March 27, Mr. Arellanes appeared for work at the scheduled start of his shift. Mr. Arellanes noted that his timecard did not work correctly. Nonetheless, Mr. Arellanes reported to his workstation and worked until a scheduled doctor appointment for a work-related issue. Mr. Arellanes reported to the human resources department to address the problem with his timecard. At that time, a human resources representative told Mr. Arellanes that he was discharged for attendance.

Mr. Arellanes established an "additional claim" for unemployment insurance benefits that was effective March 30, 2008.

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).

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).

The employer has failed to participate in the appeal hearing and has thereby failed to produce any evidence to establish that the claimant was discharged for misconduct. The claimant testified at the appeal hearing that his final absence was due to illness. This testimony conflicts with the statement the claimant provided to a Workforce Development representative at the time of the April 24, 2008 fact-finding interview. Mr. Arellanes told the fact-finder that the final absence was due to personal or legal matters. The claimant testified the he provided the employer with a doctor's note. This testimony conflicts with the statement the claimant provided at the time of the fact-finding interview. Mr. Arellanes told the fact-finder that he did not take in a doctor's note and that this was due to his injury. In any event, the employer has failed to produce available evidence. The evidence in the record establishes, at most, a single

unexcused absence on March 26, 2008. However, a single unexcused absence does not constitute misconduct. See Sallis v. Employment Appeal Board, 437 N.W.2d 895 (Iowa 1989).

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

DECISION:

The Agency representative's May 6, 2008, reference 0, 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css