

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ANTONIO J PONCE
Claimant

APPEAL NO. 17A-UI-01023-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SIVYER STEEL CORPORATION
Employer

OC: 07/03/16
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Antonio Ponce filed a timely appeal from the January 23, 2017, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on the claims deputy's conclusion that Mr. Ponce was discharged on January 3, 2017 for violation of a known company rule. After due notice was issued, a hearing was held on February 17, 2017. Mr. Ponce participated. The employer did not respond to the hearing notice instructions to register a telephone number for the hearing and did not participate. Exhibit A was 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: Antonio Ponce was employed by Sivyver Steel Corporation as full-time magnetic particle inspector from 2010 until January 5, 2017, when the employer discharged him for attendance. Mr. Ponce had been absent on December 22 or 23. In response to that absence, the employer suspended Mr. Ponce for three days. The suspension was supposed to begin after the holidays and Mr. Ponce was supposed to return to work on January 5, 2017. There was a miscommunication between the employer's human resources department and the plant manager. The plant manager believed that Mr. Ponce was supposed to return to work on January 2, 2017 and deemed Mr. Ponce's absence that day a no-call/no-show. On January 4, 2017, the human resources department contacted Mr. Ponce to confirm that he was scheduled to return to work on January 5, 2017. When Mr. Ponce returned to work, the plant manager discharged Mr. Ponce from the employment based on the alleged January 2, 2017 no-call/no-show absence.

REASONING AND CONCLUSIONS OF LAW:

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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).

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).

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). Employers may not graft on additional requirements to what is an excused absence under the law. See *Gaborit v. Employment Appeal Board*, 743 N.W.2d 554 (Iowa Ct. App. 2007). For example, an employee's failure to provide a doctor's note in connection with an absence that was due to illness properly reported to the employer will not alter the fact that such an illness would be an excused absence under the law. *Gaborit*, 743 N.W.2d at 557.

The employer did not participate in the appeal hearing and did not present any evidence to meet its burden of proving a discharge based on misconduct in connection with the employment. The evidence in the record establishes that the purported final absence that triggered the discharge was actually a period of suspension. The evidence in the record fails to establish any absences that would be unexcused absences under the applicable law. The evidence in the record fails to establish any misconduct in connection with the employment. Mr. Ponce was discharged for no disqualifying reason. Accordingly, Mr. Ponce is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

DECISION:

The January 23, 2017, reference 01, decision is reversed. The claimant was discharged on January 5, 2017 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/rvs