

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOSE YZQUIERDO

Claimant

APPEAL NO. 16A-UI-07646-JT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ABM ONSITE SERVICES MIDWEST INC

Employer

OC: 06/12/16

Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Jose Yzquierdo filed a timely appeal from the July 7, 2016, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on an agency conclusion that Mr. Yzquierdo was discharged on May 14, 2016 for repeated tardiness in reporting for work after being warned. Mr. Yzquierdo requested an in-person hearing. After due notice was issued, an in-person hearing was held in Des Moines on August 16, 2016. Mr. Yzquierdo participated. Attorney Katie Shanahan represented the employer and presented testimony through Dee Hunter. Exhibits One through 16 were received into evidence

ISSUE:

Whether Mr. Yzquierdo 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: ABM Onsite Services Midwest, Inc. provides cleaning services at the Iowa Veterans Home in Marshalltown. Jose Yzquierdo was employed by ABM as a full-time general cleaner from December 2013 until May 24, 2016, when Bethan Willey, ABM Assistant Account Manager, discharged him for repeated tardiness in reporting for work. Dee Hunter is the ABM Account Manager assigned to the Iowa Veterans Home and participated in the decision to discharge Mr. Yzquierdo from the employment. Mr. Yzquierdo was assigned to the day shift. His scheduled start time was 7:00 a.m. Under the employer's written policy, Mr. Yzquierdo could clock in from 6:55 to 7:07 a.m. and be considered on time for work. However, if Mr. Yzquierdo clocked in at 7:08 a.m., the employer would consider him late. If Mr. Yzquierdo needed to be absent or late for work, the employer's written policy required that he telephone the workplace at least an hour prior to the scheduled start of his shift. The employer provided Mr. Yzquierdo with a copy of the attendance policy and the absence reporting policy at the start of the employment. Mr. Yzquierdo was aware of the policies.

The final incident that triggered the discharge occurred on May 19, 2016, when Mr. Yzquierdo was late to work because he had overslept. Mr. Yzquierdo clocked in at 7:13 a.m. On May 19,

2016, the employer suspended Mr. Yzquierdo for three days and directed him to return on May 24, 2016 for a meeting concerning his employment. When Mr. Yzquierdo appeared for the meeting on May 24, the employer notified Mr. Yzquierdo that he was discharged from the employment.

Under the employer's policy, the employer bases discipline for attendance on a rolling six-month period. The absences that factored in the employer's decision to discharge Mr. Yzquierdo dated from January 15, 2016 to the final absence on May 19, 2016. On January 15, Mr. Yzquierdo was late to work because he overslept. Mr. Yzquierdo clocked in at 7:09 a.m. On January 25, 2016, Mr. Yzquierdo was absent due to allergy-related illness. Mr. Yzquierdo notified the employer sometime between 6:00 a.m. and 7:00 a.m. of his need to be absent. On February 17, Mr. Yzquierdo was late getting to work due to transportation issues. Mr. Yzquierdo clocked in at 7:10 p.m. On February 22, 2016, Mr. Yzquierdo was late to work because he overslept. Mr. Yzquierdo clocked in at 7:16 a.m. On April 12, Mr. Yzquierdo was late getting to work because he overslept and because of transportation issues. Mr. Yzquierdo clocked in at 7:24 a.m. On May 9, Mr. Yzquierdo was late to work because he overslept. Mr. Yzquierdo clocked in at 7:27 a.m. In connection with the above absences the employer issued reprimands for attendance on January 15, January 16, February 17, February 22, March 1, March 4, April 12, and May 19. The reprimands issued in connection with the above absences included at least three "final" warnings and two suspensions. The employer had issued earlier reprimands for attendance in connection with earlier absences.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

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 evidence in the record establishes excessive unexcused absences. Each of the late arrivals referenced above was an unexcused absence under the applicable law. All but one of those late arrivals involved Mr. Yzquierdo oversleeping. Two of the late arrivals involved

transportation issues. Both issues, getting up on time and securing reliable transportation, were matters of personal responsibility. The employer has presented insufficient evidence to establish that the January 25, 2016 full-day absence was an unexcused absence. The repeated unexcused tardiness occurred in the context of several reprimands for attendance. Prior to the final late arrival on May 19, Mr. Yzquierdo was fully aware that his attendance issues placed the employment in jeopardy. Mr. Yzquierdo's repeated tardiness in the context of the repeated warnings demonstrated a willful and wanton disregard of the employer's interest in having employees show for work on time so the employer could meet its contractual obligation to the Iowa Veterans Home. At the hearing, Mr. Yzquierdo attested to his good character as an employee. While Mr. Yzquierdo may have been a hard worker, that does not prevent his repeated tardiness from constituting misconduct in connection with the employment.

Because the administrative law judge concludes that Mr. Yzquierdo was discharged for misconduct in connection with the employment, he is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. Mr. Yzquierdo must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

DECISION:

The July 7, 2016, reference 01, decision is affirmed. The claimant was discharged for misconduct in connection with the employment based on excessive unexcused tardiness. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs