

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JAVIER F AVILES
Claimant

APPEAL NO. 13A-UI-06364-N

**ADMINISTRATIVE LAW JUDGE
DECISION**

THE AMERICAN BOTTLING COMPANY
Employer

OC: 01/06/13
Claimant: Appellant (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

The claimant filed a timely appeal from a representative's decision dated May 23, 2013, reference 01, which denied unemployment insurance benefits finding that the claimant was discharged from work for excessive, unexcused absenteeism and tardiness after being warned. After due notice was provided, a hearing was held in Ottumwa, Iowa on July 23, 2013. Mr. Aviles appeared personally. The employer participated by Ms. Julie Montgomery, Human Resource Manager.

ISSUE:

The issue is whether the claimant was discharged for misconduct in connection with his work.

FINDINGS OF FACT:

Javier Aviles was employed by the American Bottling Company from March 26, 2007 until April 17, 2013 when he was discharged for exceeding the permissible number of attendance infractions allowed under company policy. Mr. Aviles was employed as a full-time machine operator and was paid by the hour.

Under the provisions of the employer's attendance policy, the employees are subject to discharge if they exceed more than six attendance infraction points in a rolling 12-month period. Employees are assessed one point for each day of absence and one-half point for tardiness up to two hours. If an employee is absent due to illness and provides a doctor's note, the days of absence due to illness are combined and the employee is assessed only one point. Personal days are available for employees to use so that they will not exceed the number of infractions allowed by the company. If an employee proposes to use personal days for an absence they are required to provide reasonable advanced notice to the employer. The company posts attendance infractions for employees and that information is available to them.

During the course of his employment Mr. Aviles had been absent on numerous occasions and had received numerous warnings from the employer when his attendance infraction points neared the level that would require discharge from employment.

Most recently Mr. Aviles had been absent in April 2013 due to recurrent transportation issues. The claimant's last absence took place on April 11, 2013 when the claimant's wife was out of town and Mr. Aviles was unable to make child care arrangements for his daughter. Mr. Aviles called in to report that he would be absent on April 11. At that time the claimant's supervisor stated that he "thought" that one previous attendance infraction point may have dropped off that month. Although information on the number of attendance infraction points assessed was available to Mr. Aviles, the claimant had not recently checked the number of points that he had accumulated. A review of company records show that Mr. Aviles had exceeded the permissible number of infractions allowed. He was, therefore, discharged from 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.

871 IAC 24.32(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

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 insurance benefits. Conduct that may be serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant the denial of unemployment insurance 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. of Appeals 1992).

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). A 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, oversleeping or securing child care are considered unexcused. On the other hand, absences related to illness are considered excused providing the employee has complied with the employer's policy regarding notifying the employer of the absence.

The evidence in the record establishes that Mr. Aviles had been excessively absent in the course of his employment with The American Bottling Company. The claimant had repeatedly reached the level of final warning where one additional attendance infraction would result in termination but that the claimant had repeatedly avoided termination by not being absent again until one or more attendance infraction points had "rolled off" after twelve months had elapsed. In April 2013, the claimant had been absent primarily due to recurrent transportation issues and had again reached the level where one additional infraction point would cause his termination.

The claimant's final absence took place when the claimant had no transportation to work and had not made suitable child care arrangements for his daughter in sufficient time to obtain a ride to work with another employee.

The administrative law judge concludes the claimant's unexcused absences were excessive and that the claimant had been properly warned. No contract for employment is more basic than the right of the employer to expect employees will appear for work on the hour and day agreed upon. Recurrent failure to honor that obligation shows a substantial disregard for the employer's interests and thus justifies a finding of misconduct in connection with the work. Unemployment insurance benefits are withheld.

DECISION:

The representative's decision dated May 23, 2013, reference 01, is affirmed. Claimant is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount and is otherwise eligible.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs