

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LENNY SANTIBANEZ
Claimant

APPEAL NO. 12A-UI-07883-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CRETEX CONCRETE PRODUCTS
Employer

OC: 06/03/12
Claimant: Appellant (2)

Iowa Code Section 96.5(2)(a) - Discharge

STATEMENT OF THE CASE:

Lenny Santibanez filed a timely appeal from the June 25, 2012, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on July 23, 2012. Mr. Santibanez participated. The employer did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate.

ISSUE:

Whether Mr. Santibanez separated from the employment for a reason that disqualifies him for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Lenny Santibanez was employed by Cretex Concrete Products as a full-time laborer from March 2011 and last performed work for the employer on Friday, May 25, 2012. Mr. Santibanez usually worked Monday through Friday and started his shift at 6:00 a.m. On Monday, May 28, Memorial Day, Mr. Santibanez's brother passed away in Texas. Mr. Santibanez immediately traveled to Texas to be with his family. On Tuesday morning, Mr. Santibanez telephoned the workplace and left a message for the employer. Later that week, Mr. Santibanez spoke to the general supervisor and advised that his brother had passed away and was to be buried on Friday, June 1. On that day, Mr. Santibanez spoke with the employer and the employer asked whether Mr. Santibanez would be back at work on Monday, June 4. Mr. Santibanez said that provided everything went as planned, he would return to work that Monday. Mr. Santibanez arrived back in Iowa on Tuesday evening, June 5. On Wednesday, June 6, Mr. Santibanez appeared for work at the scheduled start of his shift. The employer told him he was suspended. The employer subsequently told Mr. Santibanez that he was being discharged for excessive absences. Mr. Santibanez had been absent for six work days in connection with his brother's passing.

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).

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 failed to participate in the appeal hearing, and thereby failed to present any evidence to support the allegation that Mr. Santibanez was discharged for excessive unexcused absences or other misconduct in connection with the employment. The weight of evidence in the record establishes that Mr. Santibanez appropriately notified the employer that he would return to work on the Monday following the Friday funeral in Texas, provided things went according to plan. Obviously, things did not go according to plan and it was necessary for Mr. Santibanez to return to work two days later than expected. The evidence is insufficient to establish unexcused absences or other misconduct. The administrative law judge notes that circumstances of Mr. Santibanez's absence fall within an exception to disqualification found in Iowa Code section 96.5(1)(f). That section of the Code leaves an employee eligible for benefits, and an employer liable for benefits, where the employee is absent from work no more than 10 working days for compelling personal reasons, provided the employee notified the employer of the basis for the absence at the start and attempted to return to the employment as soon as the compelling personal circumstances had passed.

Mr. Santibanez was discharged for no disqualifying reason. Mr. Santibanez is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

DECISION:

The Agency representative's June 25, 2012, 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs