

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

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Appeal Number: 06A-UI-08201-JTT
OC: 07/09/06 R: 01
Claimant: Appellant (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.22(2)(j) – Reemployment at the End of a Negotiated Leave of Absence

STATEMENT OF THE CASE:

Ramon Gonzalez filed a timely appeal from the August 7, 2006, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on August 30, 2006. Mr. Gonzalez participated personally and was represented by Attorney Jay Smith. The employer received notice of the hearing, provided a telephone number for the hearing, but at the scheduled time of the hearing waived its participation. Spanish-English interpreter Ike Rocha assisted at the hearing. Claimant's Exhibits A and B were received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Ramon Gonzalez was employed by John Morrell & Company as a full-time maintenance worker from

1998 until July 10, 2006, when Human Resources Director Steve Joyce discharged him. On June 13, 2006, Mr. Gonzalez learned that his father was seriously ill. On June 12, Mr. Gonzales' father was hospitalized in Mexico with chronic kidney disease. On June 14, Mr. Gonzalez requested a leave of absence so that he could travel to Mexico to assist his family with his father's medical needs. On June 14, Human Resources Director Steve Joyce approved a nine-day leave of absence with an anticipated return date of June 23. Mr. Gonzalez was not able to leave for Mexico until June 19.

On June 22, Mr. Gonzalez's father passed away. On the same day, Mr. Gonzalez faxed to the employer a copy of the death certificate concerning his father. On the same day, Mr. Gonzalez contacted his wife, Aliscia Gonzalez, and asked her to contact the employer to confirm receipt of the death certificate and to ask the employer to extend the leave of absence. On the same day, Ms. Gonzalez contacted the employer. Ms. Gonzalez told the employer that Mr. Gonzalez's father had passed away. The employer confirmed receipt of the death certificate. Ms. Gonzalez told the employer that, due to funeral expenses, Mr. Gonzalez would be without funds to return to Iowa until Ms. Gonzalez received her next paycheck on June 29. The employer told Ms. Gonzalez that the leave of absence would be extended to July 3. The employer also told Ms. Gonzalez that if Mr. Gonzalez was unable to return by July 3, she should contact the employer on July 5.

On June 30, Ms. Gonzalez conveyed all of this information to Mr. Gonzalez. After Mr. Gonzalez's father's death, Mr. Gonzalez's mother was ill with a heart condition. Mr. Gonzalez stayed in Mexico to assist with his mother's care. Mr. Gonzalez was unable to return to work by July 3. At 11:30 p.m. on July 4, Mr. Gonzalez telephoned his wife to advise that he was delayed at the United States/Mexico border. A short time later, Mr. Gonzalez called his wife to advise he was back in the United States.

On July 5, Ms. Gonzalez telephoned the employer as the employer had instructed. Ms. Gonzales notified the employer that Mr. Gonzalez was enroute to Iowa. Ms. Gonzalez left appropriate contact information so that the employer could get back in touch with her. The employer did not call back. On Friday, July 7, Mr. Gonzalez returned to Iowa and went to the employer to enquire about his employment status. Mr. Gonzalez spoke with Human Resources Director Steve Joyce, who told him to return on Monday, July 10. On July 10, Mr. Gonzalez returned to the workplace as directed. At that time, Mr. Joyce discharged Mr. Gonzalez from the employment for allegedly returning late from the leave of absence. Mr. Gonzalez's conversations with the employer on July 7 and 10 both took place without the assistance of an interpreter. Mr. Gonzalez does not speak English.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Gonzalez was discharged for misconduct in connection with the employment. It does not.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 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).

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 evidence in the record indicates that the employer extended the approved leave of absence to July 3. The evidence further indicates that the employer indicated a willingness to further extend the leave of absence, provided Mr. Gonzalez's wife contacted the employer with such a request on July 5. The evidence indicates that Mr. Gonzalez's wife made appropriate contact with the employer on July 5 and advised the employer at that time that Mr. Gonzalez was in the

process of returning to Iowa, but would need another brief extension of the leave of absence. The evidence indicates that Mr. Gonzalez reasonably relied upon the employer's extensions and final offer to further extend the leave of absence and returned to the employer on July 7.

The evidence does not support a conclusion that Mr. Gonzalez formed an intent to quit the employment. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992).

The employer waived its right to participate in the hearing and, accordingly, failed to present any evidence to establish misconduct. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Gonzalez was discharged for no disqualifying reason. Accordingly, Mr. Gonzalez is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Gonzalez.

DECISION:

The Agency representative's decision dated August 7, 2006, reference 01, 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.

jt/cs