

BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

FRANCISCO T ESTRADA

Claimant,

and

BEEF PRODUCTS INC

Employer.

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HEARING NUMBER: 09B-UI-12713

EMPLOYMENT APPEAL BOARD
DECISION

NOTICE

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT IS FILED WITHIN 30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-2-a

DECISION

UNEMPLOYMENT BENEFITS ARE DENIED

The employer appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The claimant, Francisco T. Estrada, was employed by Beef Products, Inc. from September 25, 2007 through July 3, 2009 as a full-time laborer, working Monday through Saturday from 10:00 p.m. until 6:00 a.m. (Tr. 4-5, 10) At the start of his employment, the claimant received a copy of the attendance policy (point system), which required notification and the reason for an absence at least 30 minutes prior to the start of one's shift. (Tr. 5, 8, Exhibit 6) The claimant signed this policy in acknowledgment of receipt. (Tr. 16, Exhibit 6)

The claimant experienced attendance problems as well as other disciplinary issues. He received written warnings on April 28, 2008 and July 1, 2008 for conduct issues. (Tr. 9, 17, Exhibits 3 & 5) On

August 6, 2008 and November 19, 2008, Mr. Estrada got up late and was tardy to work, which cost him

attendance points. (Tr. 7, 14, 15-16) The claimant called in sick on June 24, 2009 for which the employer issued a written warning for attendance that same day based on a noted 'pattern' of absences around the weekends (Friday-February 13th, Saturday-March 28, 2009 and Tuesday-June 16th, the day after two days of no production). (Exhibit 2) Mr. Estrada's car broke down on June 29th and he called off work (Tr. 13), as he had done for a previous transportation problem on May 13, 2009. (Tr. 14)

On July 2, 2009, Mr. Estrada called in 30 minutes prior to the start of his shift to report that he was sick. (Tr. 6-7, 12) The following day, he worked as scheduled. (Tr. 6-7, 12) The employer was shutdown on July 4th because of the national holiday. It is the employer's policy to have employees work the weekend immediately following a holiday. (Tr. 19) Employees are required to call in for their schedule after the holiday. The next day, however, Mr. Estrada failed to call in or report to work that day. (Tr. 6, 13, Exhibit) The employer terminated him based on his no call/no show and previous record of unexcused absences.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2009) provides:

Discharge for Misconduct. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:

The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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 Iowa Supreme court has accepted this definition as reflecting the intent of the legislature. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665, (Iowa 2000) (quoting Reigelsberger v. Employment Appeal Board, 500 N.W.2d 64, 66 (Iowa 1993)).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 NW2d 661 (Iowa 2000).

The record establishes that Mr. Estrada had a history of absenteeism for which several absences were due to illness and therefore, excused. However, the claimant also incurred several absences related to tardiness and transportation issues all of which involved purely personal reasons that by law are considered unexcused. See, Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984); see also, Harlan v. Iowa Department of Job Service, 350 N.W.2d 192 (Iowa 1984). The final act that led to his termination was a no call/no show on July 5th, 2009. Since it was the day after a holiday, it was incumbent upon the claimant to contact the employer regarding his work schedule. Mr. Estrada failed to adhere to this long-established policy; and in light of his past attendance infractions and accompanying written warnings, this final absence was a blatant disregard of the employer's interests. Based on this record, we conclude that the employer proved their case by a preponderance of the evidence.

DECISION:

The administrative law judge's decision dated September 29, 2009 is **REVERSED**. The claimant was discharged for disqualifying misconduct. . Accordingly, he is denied until such time he has worked in and has been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. See, Iowa Code section 96.5(2)"a".

Elizabeth L. Seiser

Monique F. Kuester

DISSENTING OPINION OF JOHN A. PENO:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

John A. Peno

AMG/fnv