IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JOSE A BENITEZ
Claimant

CARGILL MEAT SOLUTIONS CORPORATION
Employer

APPEAL NO. 09A-UI-07819-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/26/09
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the May 21, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on June 15, 2009. Claimant Jose Benitez did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Rachel Watkinson, Human Resources Associate, represented the employer. Exhibits One, Two and Three were received into evidence.

ISSUE:

Whether the claimant 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: Jose Benitez was employed by Cargill Meat Solutions Corporation as a full-time production worker form June 2, 2003 until April 27, 2009, when Sarah James, Human Resources Assistant, discharged him for attendance and violation of a last chance agreement regarding attendance. Mr. Benitez was assigned to the first shift and his start time was 5:00 a.m. Mr. Benitez's immediate supervisor was Sandy Jordan, Harvest Supervisor.

The employer had a written absence notification policy. The employer reviewed this policy with Mr. Benitez at the start of the employment and Mr. Benitez demonstrated the ability to follow the policy. The policy required that Mr. Benitez called a designated absence line at least 30 minutes before his shift if he needed to be absent. The automated absence line would prompt Mr. Benitez for his name, his department number, his supervisor's name and whether the absence was "personal" or "business." A human resources clerk would review the information left on the absence line. That information was available to the supervisor by computer. The automated absence line would not prompt Mr. Benitez to say whether the absence was due to illness or some other matter.

The final absence that triggered the discharge occurred on April 24, 2009. Mr. Benitez followed the employer's policy in reporting his absence at least 30 minutes prior to the start of his shift. The employer does not know why Mr. Benitez was absent. Mr. Benitez had been absent without notifying the employer on April 21 and 22.

On March 12, 2009, the employer entered into a last chance agreement with Mr. Benitez, whereby Mr. Benitez agreed to accrue no attendance points until September 12, 2009 and the employer agreed to continue the employment.

Prior to the last change agreement, Mr. Benitez had been absent and properly reported the absence to the employer once in June 2008, seven times in July 2008, seven times in August 2008, once in September 2008, once in January 2009, once in February 2009, and twice in March 2009. Prior to the last chance agreement, Mr. Benitez had been absent without notifying the employer on March 4 and 6, 2009.

The employer had issued warning to Mr. Benitez as he accrued attendance points.

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).

The employer had presented insufficient evidence to establish that the final absence that triggered the discharge was an unexcused absence under the applicable law. The employer cannot say whether the absence was due to illness or something else. The absence was properly reported. Because there is insufficient evidence to establish that the final absence that triggered the discharge was unexcused, the administrative law judge concludes there is no "current act" of misconduct and no disqualifying discharge. See 871 IAC 24.32(8). Mr. Benitez is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Benitez.

DECISION:

The Agency representative's May 21, 2009, reference 01 decision is affirmed. 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.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs