

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARCOS M GUERRERO

Claimant

APPEAL NO. 14A-UI-06642-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARGILL MEAT SOLUTIONS CORP

Employer

OC: 06/08/14

Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Marcos Guerrero filed a timely appeal from the June 24, 2014, reference 01, decision that disqualified him for benefits. After due notice was issued, a hearing was held on July 21, 2014. Mr. Guerrero participated. The employer waived its participation in the hearing and did so in writing via Barnett & Associates. Exhibits A, B and C 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: Marcos Guerrero was employed by Cargill Meat Solutions in Ottumwa from 2002 until May 28, 2014, when the employer discharged him for attendance. The final absence that triggered the discharge was during the period of May 9, 2014 through May 18, 2014. During that time, Mr. Guerrero was ill with depression. Mr. Guerrero properly notified the employer of the absences by calling a designated telephone number at least 30 minutes before his shifts and leaving appropriate messages at that number. Mr. Guerrero returned to work on May 19, 2014. At that time, Mr. Guerrero's supervisor told Mr. Guerrero that he several absences and that his accrual of attendance points placed his employment in jeopardy. The employer directed Mr. Guerrero to contact the employer's third-party leave administrator to see whether the leave administrator would deem any of the absences to be covered by the Family and Medical Leave Act. Mr. Guerrero cooperated with that process by taking an FMLA certification form to his doctor. The third-party administrator subsequently deemed the absences from May 12, 2014 through May 18, 2014 to be covered by FMLA, but concluded that the absences during the period of May 8-11, 2014 were not covered by FMLA. The employer concluded that Mr. Guerrero had accrued nine attendance points, which subjected him to discharge from the employment. Mr. Guerrero had continued to perform work for the employer during the period of May 19, 2014 through May 28, 2014. The employer notified Mr. Guerrero on May 28, 2014 that he was discharged from the 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 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). 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 did not participate in the appeal hearing and did not present any evidence to support the allegation that Mr. Guerrero was discharged for misconduct in connection with the employment. The sole basis for the discharge was attendance. The employer did not present any evidence to establish any unexcused absences. The evidence in the record establishes that the final absence period that triggered the discharge was based on illness and that the absences during that period were appropriately reported to the employer. Accordingly, each of the absences was an excused absence under the applicable law, regardless of whether the absence was covered by FMLA. See Gaborit v. Employment Appeal Board, 743 N.W.2d 554 (Iowa Ct. App. 2007). Because absences that are excused absences under the applicable law may not be considered against a claimant when determining benefit eligibility, the administrative law judge concludes that Mr. Guerrero was discharged for no disqualifying reason. Mr. Guerrero is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The claims deputy's June 24, 2014, 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/css