

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LANUZA, JONATHAN, A
Claimant

APPEAL NO. 13A-UI-06022-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TM ONE
Employer

OC: 09/02/12
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Jonathan Lanuza filed a timely appeal from the May 15, 2013, reference 04, decision that denied benefits. After due notice was issued, a hearing was held on June 27, 2013. Mr. Lanuza participated and presented additional testimony through Gabriela Lanuza. Lisa Serres represented the employer.

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: Jonathan Lanuza was employed by TM One as a full-time telephone account manager from April 8, 2013 until April 29, 2013, when the employer discharged him for attendance. The employer's written attendance policy required that Mr. Lanuza notify his supervisor prior to the scheduled start of the shift if he needed to be absent. Mr. Lanuza's immediate supervisor was Spencer Johnson. Mr. Johnson had just been promoted to a supervisory position from a quality assurance position. Mr. Lanuza did not receive an employee handbook from the employer. Instead, the employer told Mr. Lanuza that he needed to notify the employer prior to the scheduled start of the shift if he needed to be absent. The employer did not provide Mr. Lanuza with Mr. Johnson's phone number.

On April 22, 2013, Mr. Lanuza telephoned the employer prior to the scheduled start of the shift to notify the employer that he needed to be absent due to back pain. Mr. Lanuza spoke with Lisa Serres, Senior Administrative Specialist. Mr. Lanuza told Ms. Serres that he was suffering from severe back pain and was going to go to a doctor. Mr. Lanuza asked for Mr. Johnson's number. Ms. Serres declined to provide the number. Ms. Serres told Mr. Lanuza it was fine, she would let Mr. Johnson know of the absence.

On April 23, Mr. Lanuza telephoned the workplace prior to the scheduled start of his shift and again spoke with Ms. Serres. Mr. Lanuza told Ms. Serres that he had gone to see the doctor on

April 22 and that the doctor had taken him off work for April 22 and 23. Mr. Lanuza said he would send his wife to the workplace with the doctor's note that took him off work for the two days. Ms. Serres said she would let Mr. Johnson know of the absence.

On April 24, Mr. Lanuza telephoned the workplace prior to the scheduled start of his shift and again spoke to Ms. Serres. Mr. Lanuza told Ms. Serres that he still was not feeling well and would be absent that day. Ms. Serres agreed to pass the information along to Mr. Johnson. Later that day, Mr. Lanuza returned to the doctor. The doctor continued Mr. Lanuza off work and released him to return to work on Sunday, April 28, 2013.

On April 25, Mr. Lanuza telephoned the workplace prior to the scheduled start of his shift and spoke to Ms. Serres. Mr. Lanuza told Ms. Serres that he was still not well, would be absent that day, that he had returned to the doctor, and that he would have his wife bring the doctor's notes to the employer. Ms. Serres said she would let Mr. Johnson know. Mr. Lanuza's wife delivered both doctor's notes to the employer.

On April 26, Mr. Lanuza telephoned the workplace prior to the scheduled start of his shift and spoke to Ms. Serres. Mr. Lanuza told Ms. Serres that he still was not well and would be absent. Ms. Serres said she would let Mr. Johnson know of the absence.

Ms. Serres asserts the employer has a policy of not giving out the supervisor's number to employees. Ms. Serres also asserts that the employer would not consider it proper notice of an absence unless the employee contacted the supervisor directly at the supervisor's phone number. Ms. Serres did not discuss this purported policy with Mr. Lanuza at any of the times he called to report his absence. Ms. Serres at no time indicated to Mr. Lanuza that there was a problem with how he was reporting his absences.

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 evidence in the record establishes a discharge for attendance that was based on a series of absences that were due to illness and that were properly reported to the employer. Mr. Lanuza was a new employee. Mr. Lanuza had been given instructions to notify the supervisor if he needed to be absent from the employment, but had not been given the supervisor's direct phone number. For each day he was absent, Mr. Lanuza contacted the workplace, prior to the

scheduled start of the shift, to let the employer know that he needed to be absent that day due to illness. On the first day he was absent, Mr. Lanuza asked for the supervisors direct phone number. Ms. Serres intentionally did not give Mr. Lanuza Mr. Johnson's phone. Nor did she explain to him that his notice to the employer regarding the absence was defective. The employer's conduct was unreasonable. Mr. Lanuza's conduct was reasonable. Mr. Lanuza went one step further and had his spouse bring to the employer medical documentation that supported his need to be gone on the days he was absent. Each of Mr. Lanuza's absences was an excused absence under the applicable law and cannot be used as a basis to disqualify him for unemployment insurance benefits.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Lanuza was discharged for no disqualifying reason. Accordingly, Mr. Lanuza is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Lanuza.

DECISION:

The Agency representative's May 15, 2013, reference 04, 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