

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JUSTIN D LAFEVER
Claimant

APPEAL NO. 16A-UI-09674-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BRUENING ROCK PRODUCTS INC
Employer

OC: 08/07/16
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Justin Lafever filed a timely appeal from the August 24, 2016, reference 02, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on an agency conclusion that Mr. Lafever had been discharged on April 20, 2016 for misconduct in connection with the employment. After due notice was issued, a hearing was held on September 21, 2016. Mr. Lafever participated. Chris Wilder, Payroll Manager, 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: Justin Lafever was employed by Bruening Rock Products, Inc. as a full-time mine laborer/truck driver from 2011 until April 20, 2016, when Steve Beebe, Foreman, discharged him for attendance. Mr. Lafever's regular work hours were 5:00 a.m. to 3:00 or 5:00 p.m., Monday through Friday. Mr. Lafever performed his work duties at a mine located in Knoxville, Iowa. Mr. Beebe became Mr. Lafever's immediate supervisor about a month before the discharge. If Mr. Lafever needed to be absent from work, the employer's absence reporting policy required that Mr. Lafever telephone Mr. Beebe by 7:30 a.m. If Mr. Beebe was unavailable, the employer expected Mr. Lafever to contact Ms. Geery, the Scale House Manager. Ms. Geery would usually arrive for work at 6:00a.m. The employer had on prior occasions also accepted notice given to Gail Helmick, the mine supervisor above Mr. Beebe. Mr. Lafever was aware of the employer's absence notification requirement. Mr. Lafever did not have a good relationship with Mr. Beebe and preferred to deal with Mr. Helmick.

Mr. Lafever was scheduled to work on April 18, 2016, but was absent from work that day. In the early morning hours of April 18, Mr. Lafever learned that his father has been in a motor vehicle accident while operating a semi tractor-trailer rig on Interstate 80 in Illinois. Mr. Lafever left his home in Harvey, Iowa and traveled to be with his father. At 6:30 a.m., Mr. Lafever attempted to

reach Mr. Helmick by telephone. When Mr. Helmick did not answer, Mr. Lafever left a voice mail message in which he explained his circumstances and indicated that he would try to get ahold of Mr. Helmick later. Immediately after Mr. Lafever left his message for Mr. Helmick, he attempted to reach Mr. Beebe by telephone at about 6:35 a.m. When Mr. Beebe did not answer, Mr. Lafever left a voice mail message indicating that he had just left a message for Mr. Helmick about his father being in a wreck and his need to travel to Illinois. When Mr. Lafever got to Illinois, he learned that his father had dislocated his shoulder and that there was additional concern about his father's heart.

Mr. Lafever was next scheduled to work on April 19, 2016, but was absent from work that day. At 8:30 a.m., Mr. Lafever attempted to reach Mr. Helmick by telephone. When Mr. Helmick did not answer, Mr. Lafever left a voice mail message asking for a return call. Mr. Lafever then called Mr. Beebe at 8:35 a.m. When Mr. Beebe did not answer, Mr. Lafever left a voice mail message asking for a return call. At 10:00 a.m., Mr. Lafever telephoned Ms. Geery. Mr. Lafever told Ms. Geery that he had not heard back from Mr. Helmick or Mr. Beebe. Mr. Lafever asked Ms. Geery to get ahold of Mr. Helmick and Mr. Beebe and to have them call him. Mr. Lafever explained that neither had responded to his messages.

Mr. Lafever was next scheduled to work on April 20, 2016 and appeared for work on time. After Mr. Lafever had been working for an hour or two, Mr. Beebe notified Mr. Lafever that he was discharged from the employment. Mr. Beebe asserted that Mr. Lafever had been absent two days without notifying the employer.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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 has presented insufficient evidence, and insufficiently direct and satisfactory evidence, to establish excessive unexcused absences or other misconduct in connection with the employment that would disqualify Mr. Lafever for unemployment insurance benefits. The employer has presented insufficient evidence to rebut Mr. Lafever's assertion that he provided proper notice of his April 18 absence. The evidence in the record does establish an unexcused absence on April 19, 2016, when Mr. Lafever was absent due to a family emergency, but did not

notify the employer until 8:30 a.m. The single unexcused absence is insufficient to establish misconduct. The employer had the ability to present testimony from persons with firsthand, personal knowledge of the events leading to Mr. Lafever's discharge, but elected not to present such testimony.

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

DECISION:

The August 24, 2016, reference 02, decision is reversed. The claimant was discharged on April 20, 2016 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/rvs