

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

ERACLIO AVALOS-LOPEZ
301 N 7TH ST
MARSHALLTOWN IA 50158

SWIFT & COMPANY
c/o EMPLOYERS UNITY INC
PO BOX 749000
ARVADA CO 80006-9000

Appeal Number: 05A-UI-05608-JTT
OC: 05/01/05 R: 02
Claimant: Appellant (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

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

STATEMENT OF THE CASE:

Eraclio Avalos-Lopez (claimant) filed a timely appeal from the May 20, 2005, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on June 14, 2005. Mr. Avalos-Lopez participated in the hearing with the assistance of Spanish-English interpreter Rosie Paramo-Ricoy. The employer did not respond to the notice of the hearing and did not participate in the hearing.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Eraclio Avalos-Lopez was employed by Swift & Company on a full-time basis from December 1, 1998 until May 5, 2005, when Swift's human resources staff terminated his employment based on three days no-call/no-show in violation of company policy. Mr. Avalos-Lopez is a non-English speaking individual. Mr. Avalos-Lopez cannot read or write his native language, Spanish.

The three-day absence that prompted the termination occurred during May 2-4, 2005. Mr. Avalos-Lopez had previously requested time off so that he could travel to Mexico to be with his 87-year-old mother, who was seriously ill. Swift had approved that absence and expected Mr. Avalos-Lopez to return to work on Monday, May 2. While Mr. Avalos-Lopez was still in Mexico, he concluded that he would need to remain in Mexico longer than anticipated. Mr. Avalos-Lopez had his mother's physician fax to Swift documentation of his mother's condition and his request for additional time away from work. Swift may not have received the facsimile. At some point, Mr. Avalos-Lopez attempted to reach Swift by telephone, but did not make contact with anyone at Swift. Mr. Avalos-Lopez indicates that he was distraught over his mother's illness and cannot say when he made the call.

Mr. Avalos-Lopez returned to Iowa on the evening of May 4 and returned to work the next day. When he returned to work, Mr. Avalos-Lopez met with a member of Swift's human resources department. It was during this meeting, that Swift asserted it had not received the fax. The employer advised Mr. Avalos-Lopez that his employment had been terminated due to three days no-call/no-show. Mr. Avalos-Lopez was aware that the employer had a policy whereby an employee who was absent for work for three consecutive shifts without notifying the employer would be deemed to have voluntarily quit. Mr. Avalos-Lopez had learned about the policy during his initial orientation at Swift.

Despite his desire to remain with his mother in Mexico, Mr. Avalos-Lopez returned to Iowa, with the intention of returning to work at Swift so that he could help pay for his mother's medical care.

REASONING AND CONCLUSIONS OF LAW:

The first question for the administrative law judge is whether the evidence in the record establishes that Mr. Avalos-Lopez voluntarily quit the employment or was discharged.

A person will be presumed to have voluntarily quit his employment if he is absent from work without notifying the employer for three consecutive shifts in violation of a company rule. See 871 IAC 24.25(4). In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). Since Swift did not participate in the hearing, the evidence in the record is limited to the testimony of Mr. Avalos-Lopez. Mr. Avalos-Lopez's testimony was sufficient to rebut the presumption that he had voluntarily quit the employment. Based on the evidence in the record, the administrative law judge concludes that Mr. Avalos-Lopez was discharged and did not voluntarily quit the employment.

The next issue for the administrative law judge is whether the evidence in the record establishes that Mr. Avalos-Lopez was discharged for misconduct.

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(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

Because the claimant was discharged, the employer bears 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).

In order for Mr. Avalos-Lopez's absences to constitute misconduct that would disqualify him from receiving unemployment insurance benefits, the employer must show that the 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 employer must first show 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 of the employee or an immediate family member is 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 evidence in the record establishes that Mr. Avalos-Lopez's absence from work during the period of May 2-4 was based on the serious illness of Mr. Lopez's 87-year-old mother. The evidence further indicates that, despite his language barrier and lack of formal education, Mr. Avalos-Lopez took reasonable steps to notify his employer of his need to extend his time with his ailing mother. Mr. Avalos-Lopez cannot, and should not, be faulted for a facsimile that failed to successfully negotiate the Mexican and/or American telephone network. The administrative law judge concludes that Mr. Avalos-Lopez's absence during May 2-4 was an excused absence under the law cited above. The administrative law judge further concludes that the evidence in the record fails to establish a current act of misconduct on the part of Mr. Avalos-Lopez. See 871 IAC 24.32(8). Mr. Lopez was discharged for no disqualifying reason. Accordingly, Mr. Lopez is eligible for benefits, provided he is otherwise eligible.

DECISION:

The representative's decision dated May 20, 2005, reference 01, is reversed. The claimant was discharged from his employment for no disqualifying reason. The claimant is eligible for benefits, provided he meets all other eligibility requirements.

jt/sc