

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

STEVE NAVARRO
Claimant

APPEAL NO. 19A-UI-00282-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SCE PARTNERS LLC
Employer

OC: 11/25/18
Claimant: Respondent (2)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the January 7, 2019, reference 01, decision that held the claimant was eligible for benefits provided he met all other eligibility requirements and that the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on July 31, 2018 for no disqualifying reason. After due notice was issued, a hearing was held on January 28, 2019. Claimant Steve Navarro did not comply with the hearing notice instructions to register a telephone number for the hearing and did not participate. Renae Merchant represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant, which record reflects that no benefits were disbursed to the claimant in connection with the November 25, 2018 claim. Exhibits 1 through 8 were received into evidence.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Steve Navarro was employed by SCE Partners, L.L.C., doing business as Hard Rock Hotel & Casino, as a full-time housekeeping attendant from 2016 until July 31, 2018, when Luis Perez-Lazariega, Housekeeping Supervisor, and Brandi Redel, Human Resources Director, discharged him for attendance. Mr. Perez-Lazariega was Mr. Navarro's supervisor. The employer has a written attendance policy that is included in an employee handbook. The employer provided Mr. Navarro electronic access to the handbook and had him acknowledge receipt of such access at the start of the employment. The employer reviewed the attendance policy, including the absence reporting requirement, with Mr. Navarro at the start of the employment. If Mr. Navarro needed to be late for work or absent from a shift, the employer's written attendance policy required that he call Mr. Perez-Lazariega at least two hours prior to the scheduled start of his shift. Under the policy, Mr. Navarro was subject to discharge from the

employment if he incurred 12 attendance points in a rolling 12-month period. For the purpose of issuing attendance points, the policy did not discriminate between absences due to illness versus other absences, except if the absence occurred in the context of an approved leave of absence.

The final absence that triggered the discharge occurred on July 30, 2018, when Mr. Navarro was late for personal reasons and without notice to the employer that he would be late. Mr. Navarro had been late under similar circumstances on March 9, 11, and 18, 2018. On March 21, 2018, Mr. Navarro was absent without notice to the employer. On April 30, 2018, Mr. Navarro was absent with proper notice to the employer for a reason the employer did not document. On May 18, 2018, Mr. Navarro contacted the employer 42 minutes prior to the scheduled start of his shift to notify the employer of his need to be absent and to request use of Paid Time Off for the day. On July 20, 2018, Mr. Navarro contacted the employer an hour and 16 minutes prior to the scheduled start of his shift to notify the employer of his need to be absent that day. The employer did not document the basis for the absence. On July 27, 2018, Mr. Navarro provided proper notice of his need to be absent from his shift that day. The employer did not document the reason for the absence.

Mr. Navarro incurred .5 attendance points or more in connection with each of the above absences and had reached 12 points prior to being discharged from the employment. Each time Mr. Navarro was absent, the employer issued an attendance point reminder to Mr. Navarro and had Mr. Navarro sign to acknowledge. In March 2018, the employer issued a performance appraisal to Mr. Navarro and referenced attendance as an area needing improvement. In March 2018 and May 2018, the employer issued written reprimands to Mr. Navarro based on his attendance.

Mr. Navarro established an original claim for benefits that was effective November 25, 2018, but has received no benefits in connection with the claim.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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).

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 misconduct in connection with the employment based on excessive unexcused absences. The weight of the evidence establishes

that the final late arrival on July 30, 2018 was for personal reasons, was without proper notice to the employer, and was an unexcused absence under the applicable law. This incidence of unexcused tardiness was followed by three similar unexcused late arrivals in March 2018. Mr. Navarro's absences also included a no-call/no-show in March 2018 and absences with late notice to the employer on May 18 and July 20. Each of these absences was an unexcused absence under the applicable law. The absences occurred in the context of the various warnings the employer issued to Mr. Navarro regarding his attendance. These unexcused absences were excessive. The employer presented insufficient evidence to prove unexcused absences on April 30, 2018 and July 27, 2018.

Because the evidence in the record establishes excessive unexcused absences, Mr. Navarro is disqualified for benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. Mr. Navarro must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

Because Mr. Navarro received no unemployment insurance benefits in connection with the claim, there is no overpayment of benefits to address.

DECISION:

The January 7, 2019, reference 01, decision is reversed. The claimant was discharged on July 31, 2018 for misconduct in connection with the employment, based on excessive unexcused absences. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs