IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MATTHEW E LUKE
Claimant

MENARD INC
Employer

APPEAL NO. 12A-UI-11031-W

ADMINISTRATIVE LAW JUDGE DECISION

OC: 8/12/12
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a fact-finding decision dated September 4, 2012, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, an in-person hearing was scheduled for and held on November 27, 2012. Claimant participated personally. Employer participated by corporate counsel, Paul Hammel. Tyler Wolf, Second Assistant GM and Josh Vrogley, Second Assistant Hardware, participated as witnesses for the Employer. Exhibits A - D were admitted into evidence.

ISSUE:

The issue in this matter is whether claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds:

Claimant was discharged on August 10, 2012 by employer because of absenteeism. The employer has a "no fault" attendance policy which assigns points for absences regardless of the reason. Claimant was absent for unexcused reasons on August 3, 2012. He called in after his shift began on that date. His shift was set to begin at 7:00 a.m. He called somewhere between 8:00 a.m. and 11:30 a.m. As a result of this absence, the claimant was assigned five points placing him at ten points which resulted in termination.

The claimant was absent for a non-work related foot injury on July 19, 2012. He was assigned three points for this absence. He had two prior instances of tardiness on May 31, 2012 and May 15, 2012, which were assigned one point each. There was no evidence regarding why claimant was tardy on these dates other than claimant's speculation that he overslept due to taking pain medication for a work-related injury.

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.

871 IAC 24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation. The Iowa Supreme Court has opined that one unexcused absence is not misconduct even when it followed nine other excused absences and was in violation of a direct order. Sallis v. Employment Appeal Board, 437 N.W.2d 895 (Iowa 1989). Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984), held that the absences must be both excessive and unexcused. The Iowa Supreme Court has held that excessive is more than one. Three incidents of tardiness or absenteeism after a warning has been held misconduct. Clark v. Iowa Department of Job Service, 317 N.W.2d 517 (Iowa App. 1982). While three is a reasonable interpretation of excessive based on current case law and Webster's Dictionary, the interpretation is best derived from the facts presented.

In this matter, the evidence fails to establish that claimant was discharged for an act of misconduct when claimant violated employer's policy concerning absenteeism. The claimant had one unexcused absence and two instances of unexcused tardiness between May 2012 and August 2012. While this is a close case, when the record is viewed as a whole, these three instances do not rise to the requisite level of intentional misconduct defined by Iowa law. Based upon the limited facts presented, this single absence combined with two minor instances of tardiness do not amount to excessive absenteeism.

DECISION:

The fact-finding decision dated September 4, 2012, reference 01, is reversed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

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Joseph L. Walsh
Administrative Law Judge

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Decision Dated and Mailed

jlw/css