

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NICHOLAS R GANDER
Claimant

APPEAL NO. 11A-UI-10729-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

VTI ARCHITECTURAL PRODUCTS INC
Employer

OC: 05/01/11
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the August 9, 2011, reference 02, decision that allowed benefits. After due notice was issued, a hearing was held on September 7, 2011. Claimant Nicholas Gander participated. Mary Clark, Human Resources Administrator, represented the employer. Exhibits One and Two were received into evidence.

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: Nicholas Gander was employed by VTI Architectural Products as a full-time production worker from November 2010 until May 2, 2011, when Production Supervisor Patrick Zimmer and Human Resources Administrator Mary Clark discharged him for attendance. Ms. Clark notified Mr. Gander of the discharge.

The final absence that factored in the discharge was Mr. Gander's absence due to illness properly reported on May 2, 2011. The employer's policy required that Mr. Gander telephone his supervisor prior to the scheduled start of his if he needed to be absent. If the supervisor was not available, Mr. Gander was to leave a message for the supervisor indicating who he was, why he was absent, and when he would return. Mr. Gander was familiar with the policy.

Mr. Gander had been absent for a mandatory overtime shift scheduled to start at 3:30 p.m. on Saturday, April 30. The employer's practice was to announce the overtime shift during the daily employee meeting and to post notice on doors. Mr. Gander was at work on Monday, April 25, through Friday, April 29. Mr. Gander did not hear the employer announce mandatory overtime and did not see it posted on the doors. Mr. Zimmer attempted to leave a message for Mr. Gander when he did not appear, but Mr. Gander did not receive that message.

In making the decision to end the employment, the employer considered additional absences. On February 2, Mr. Gander was absent due to illness properly reported. On February 15, Mr. Gander was absent for personal reasons and properly reported the absence. On February 18, Mr. Gander was late for personal reasons. On March 11, Mr. Gander was absent for personal reasons and properly reported the absence. On March 18, Mr. Gander was absent due to illness and properly reported the absence.

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).

The evidence in the record establishes *unexcused* absences on February 15 and 18, and March 11. The evidence establishes *excused* absences on February 2, March 18 and April 30, May 2. The employer has presented insufficient evidence, and insufficiently direct and satisfactory evidence, to establish that Mr. Gander had been provided noticed of the April 30 overtime shift. The employer had the ability to present testimony from Mr. Zimmer, but did not present such testimony.

The evidence fails to establish an unexcused absence that would be a current act of misconduct. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Gander was discharged for no disqualifying reason. Accordingly, Mr. Gander is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Gander.

DECISION:

The Agency representative's August 9, 2011, reference 02, decision is affirmed. 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