

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**CASSIDY J YOUNG**  
Claimant

**APPEAL NO. 06A-UI-08431-JT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**MENARD INC**  
Employer

**OC: 07/23/06 R: 04  
Claimant: Appellant (1)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct  
871 IAC 24.32(7) – Excessive Unexcused Absences

**STATEMENT OF THE CASE:**

Cassidy Young filed a timely appeal from the August 16, 2006, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on November 29, 2006, at the Dubuque Workforce Development Center. Mr. Young participated. Jennifer Giebel, Store Counsel, represented the employer and presented testimony through Plumbing and Housewares Department Manager Jude Herrig. Exhibits One through Seven and A were received into evidence.

**ISSUE:**

Whether the claimant was discharged for misconduct in connection with the employment, based on excessive unexcused absences, that disqualifies him for unemployment insurance benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Cassidy Young was employed by Menard as part-time Sales Associate until July 11, 2006, when Plumbing and Housewares Manager Jude Herrig and Assistant General Manager Steve Meyer discharged him for attendance. On May 1, Mr. Herrig became Mr. Young's immediate supervisor. Prior to May 1, Mr. Herrig had no involvement in supervising Mr. Young's employment. Mr. Herrig is unable to provide information regarding Mr. Young's attendance history for the period prior to May 1.

The employer has a written attendance policy. Under the policy, an employee may clock in up to five minutes after the scheduled start of a shift without being deemed tardy. The employer's attendance policy is silent as to when and how an employee must notify the employer of the need to be absent, but does indicate a requirement that the employee notify his/her supervisor of the need to be absent. Under the policy, the employer considers only the employee's attendance history within the 90-day period predating the most recent absence in disciplining the employee. Under the policy, an employee will be discharged if the employee has 5 unexcused absences within a 90 day period. Mr. Young signed his acknowledgement of the policy on March 31, 2004.

The final absence that prompted the discharge occurred on July 9, 2006, when Mr. Young was nine minutes late for personal reasons.

Mr. Young's prior relevant absences were follows. On May 12, Mr. Young was approximately five hours late to work for personal reasons. The employer issued a written reprimand and counseled Mr. Young to keep better track of his work hours. On May 31, Mr. Young was tardy 17 minutes for personal reasons. This tardiness prompted a written reprimand and a three-day suspension on June 7-9. On June 18, Mr. Young was tardy 55 minutes. Mr. Young had recorded his hours as 11:00 a.m. to 7:00 p.m. Mr. Young thought this indicated an unusually short shift and called the store to confirm his start time. In connection with a prior incident in which Mr. Young had erroneously recorded his hours, an assistant manager had instructed Mr. Young to contact the store if he was in doubt of his start time. Rather than speaking to a member of management to confirm his hours for June 18, Mr. Young had another part-time employee check the schedule. The other part-time employee reported the start time as 11:00 a.m. The correct start time was 10:00 a.m. Mr. Young arrived at 10:55 a.m. At the time the employer issued the reprimand for this absence, the employer warned Mr. Young that his employment was in jeopardy. On June 20, Mr. Young was absent from a mandatory employee meeting so that he could attend a concert. Mr. Young was aware of the meeting ahead of time. Mr. Young had requested the evening off, but the request had not been granted. Mr. Young was aware that he was on the schedule to attend the meeting at the time he elected to attend the concert instead. The employer issued a written reprimand and warned Mr. Young that further unexcused absences would subject him to possible suspension or discharge. On July 5, Mr. Young was absent to attend and assist with a friend's wake. Mr. Young properly notified the employer of the need to be absent by speaking with Assistant Manager Eric Portzen. Though the employer's documentation of the absence indicates the employer considered the absence unexcused, Mr. Herrig testified at the hearing that the absence was an approved absence and that the employer took no disciplinary action against Mr. Young based on the absence. The greater weight of the evidence indicates that absence was approved.

#### **REASONING AND CONCLUSIONS OF LAW:**

The question is whether the evidence in the record establishes that Mr. Young was discharged for misconduct in connection with the employment.

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 Mr. Young's absences to constitute misconduct that would disqualify him from receiving unemployment insurance benefits, the evidence must establish that his *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 that Mr. Young's final absence/tardy on July 9 was an unexcused absence. The greater weight of the evidence establishes additional unexcused absences on May 12, May 31, June 18 and June 20. Concerning the absence on June 18, the employer reasonably expected Mr. Young to accurately record his scheduled start time and

appear for work at his scheduled start time. The coworker's erroneous reading of the schedule did not relieve Mr. Young of his duty to accurately record his scheduled start time and appear for work at his scheduled start time. The evidence indicates that during the period in question Mr. Young was repeatedly warned that his attendance was a concern and was specifically warned on two occasions that his employment was in jeopardy. Under these circumstances, the administrative law judge concludes that Mr. Young's unexcused absences were in fact excessive.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Young was discharged for misconduct. Accordingly, Mr. Young is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Young.

**DECISION:**

The Agency representative's August 16, 2006, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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