

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHARLES W GARDNER
Claimant

APPEAL NO. 11A-UI-05846-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MENARD INC
Employer

OC: 03/27/11
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Charles Gardner filed a timely appeal from the April 27, 2011, reference 02, decision that denied benefits. After due notice was issued, a hearing was held on May 27, 2011. Mr. Gardner participated. Paul Hammell, store counsel, represented the employer and presented testimony through Nate Molstad, plant manager. The hearing in this matter was consolidated with the hearing in Appeal Number 11A-UI-05845-JTT. Exhibits One through Six 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: Charles Gardner was employed by Menard, Inc., doing business as Midwest Manufacturing, as a full-time production team member from March 2010 until April 1, 2011, when Nate Molstad, plant manager, discharged him for attendance. Mr. Gardner's regular work hours were 7:00 a.m. to 3:30 p.m., Monday through Friday. Mr. Molstad was Mr. Gardner's immediate supervisor.

The employer's written attendance policy required that Mr. Gardner call and speak with a manager before his shift, or at least leave a voicemail message for a manager prior to the shift. Mr. Gardner was aware of the policy.

On March 22, 2011, Mr. Gardner was absent due to illness and properly notified the employer prior to this scheduled start of his shift. On March 23, 2011, Mr. Gardner was absent from work and failed to notify the employer. Mr. Gardner was scheduled to start vacation on March 24 and to return to work on March 30. On March 30, Mr. Gardner left a message that he would not be in. On that date, Mr. Gardner was absent because he was, in his words, "tired from doing nothing." On March 31, Mr. Gardner was absent from work and failed to notify the employer.

In making the decision to discharge Mr. Gardner from the employment, Mr. Molstad considered other absences. On January 25, Mr. Gardner was absent for personal reasons. On February 3, Mr. Gardner was late getting to work due to winter driving conditions. On March 1, Mr. Gardner was late because he had overslept.

The employer issued reprimands to Mr. Gardner for attendance on January 26, February 9, February 21, and March 1, 2011 prior to discharging Mr. Gardner from the employment.

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 administrative law judge found much of Mr. Gardner’s testimony implausible and not credible. Mr. Gardner undermined his own credibility. Mr. Gardner’s statement that he was absent on March 30 because he was “tired from doing nothing” has the hallmarks of fabricated testimony that has run out of steam. The weight of the evidence indicates that Mr. Gardner was most likely recovering from the vacation trip he says he did not take. The weight of the evidence indicates that Mr. Gardner did indeed tell Mr. Molstad he forgot to call on March 23 because he was packing for probation. Mr. Gardner’s testimony that he called at the end of March to see what he needed to bring for documentation because he had been gone on vacation and the rules might have changed defies logic. The administrative law judge found no reason to discount Mr. Molstad’s testimony.

The weight of the evidence in the record establishes excessive unexcused absences. These included the absences on January 25, and March 1, 23, 30, and 31. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Gardner was discharged for misconduct. Accordingly, Mr. Gardner 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. Gardner.

DECISION:

The Agency representative's April 27, 2011, reference 02, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account will not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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