

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**ZACH J MIHALOVICH**  
Claimant

**APPEAL NO. 16A-UI-06563-S1-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CONSTRUCTION PRODUCTS INC**  
Employer

**OC: 02/28/16**  
**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Zach Mihalovich (claimant) appealed a representative's May 18, 2016 (reference 03) decision that concluded he was not eligible to receive unemployment insurance benefits after his separation from employment with Construction Products (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for June 29, 2016. The claimant participated personally. The employer did not provide a telephone number where it could be reached and therefore, did not participate in the hearing. Exhibit One was received into evidence.

**ISSUE:**

The issue is whether the claimant was separated from employment for any disqualifying reason.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on August 24, 2015, as a full-time welder. The claimant received the employer's handbook. The attendance policy stated that an employee would be terminated if he accumulated ten attendance points before March 31, 2016. On April 1, 2015, employees with six and one-half or less points would have their point totals return to zero. Employees with seven or more points would carry any points in excess of six and one-half points into the next year. The contract was renegotiated and effective April 1, 2016, the attendance policy stated that an employee would be terminated if he accumulated seven attendance points before December 1, 2016. On January 6, February 1, and February 28, 2016, the employer issued the claimant a Disciplinary Notice. The document indicated the number of points the claimant had accumulated. As of March 31, 2016, the claimant had accumulated nine and one-half attendance points. The claimant started the new contract year with two and one-half attendance points.

The claimant asked the employer to take his two vacation days on April 21 and 22, 2016. The claimant's mother and the claimant were the only living relatives of his great aunt. After the aunt's death, his mother and the claimant had to take care of the funeral, sale of her house, and legal arrangements. The employer allowed the claimant to take one of his vacation days and

told him he had to use one of his points for the other day. On April 27, 2016, the claimant properly reported his absence due to illness. The employer assessed the claimant another point, bringing his total to four and one-half attendance points. On May 2, 2016, the employer told the claimant he had five attendance points and he was terminated.

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

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(1)a and (8) 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).

(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 employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incident of absence was a properly reported illness which occurred on April 27, 2016. The claimant's absence does not amount to job misconduct because it was properly reported. The employer has failed to provide any evidence of willful and deliberate misconduct which would be a final incident leading to the discharge. The claimant was discharged but there was no misconduct.

**DECISION:**

The representative's May 18, 2016 (reference 03) decision is reversed. The employer has not met its burden of proof to establish job-related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

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Beth A. Scheetz  
Administrative Law Judge

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Decision Dated and Mailed

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