IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

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LOVILIA IA 50150-1002

VERMEER MANUFACTURING COMPANY INC
PO BOX 200
PELLA IA 50219-0200

Appeal Number: 06A-UI-07196-JTT
OC: 06/18/06 R: 03
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

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

STATEMENT OF THE CASE:

Vermeer Manufacturing Company filed a timely appeal from the July 12, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on August 3, 2006. Human Resources Business Partner Ken Carr represented the employer and presented additional testimony through Welding Area Manager Travis Struck. Claimant Tyler Ford participated. Employer's Exhibits One through Nine were received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Tyler Ford was employed by Vermeer Manufacturing Company as a full-time, first shift welder from November 28, 2005 until June 14, 2006, when Human Resources Business Partner Ken Carr and Area Manager Travis Strunk discharged him for attendance.

The employer's written attendance policy required Mr. Ford to contact his supervisor within 30 minutes after the scheduled start of his shift if he needed to be absent. If the supervisor was not available, Mr. Ford was to leave a message on the supervisor's voicemail. Though the employer's written policy indicated that the employer would not deem an employee to have properly notified the employer until the employer spoke directly to a supervisor, the actual practice in the welding department was to simply leave a voicemail message for Mr. Strunk. Mr. Strunk did not ordinarily return the call and did not expect employees to continue to try to speak with him directly regarding being absent. Mr. Ford was aware of the formal policy as well as the practice within the welding department.

The final absence that prompted the discharge occurred on June 13, 2006. On the evening of Monday, June 12, Mr. Ford had rolled a racecar he was driving and suffered a mild concussion and other aches and pains. Medical professionals at the scene recommended that Mr. Ford follow up with his doctor on June 13. On June 13, Mr. Ford called the employer prior to the start of his shift with the intention of leaving a voicemail message for Mr. Strunk. Mr. Ford made contact with Mr. Strunk's voicemail box and proceeded to leave his message. After Mr. Ford had finished leaving his message, he noticed that the screen on his cell phone displayed a message that the call had been dropped. Mr. Ford assumed the call had been dropped *after* he left his message. Mr. Ford did not redial Mr. Strunk's number and leave another message just in case the first had not been recorded. When Mr. Strunk retrieved his voicemail messages for June 13, one call had just background noise with no voice message. Mr. Strunk retrieved the call from the voicemail system shortly *before* the day shift start time. Though the employer's voicemail system would have indicated to Mr. Strunk the time the call was received, Mr. Strunk did not record that information and does not now recall when the call was received.

Mr. Ford appeared on time for his shift on June 14. Half an hour into Mr. Ford's shift, Mr. Strunk contacted him to inquire about the absence on June 13. At that time, Mr. Ford advised that he had rolled his racecar on the evening of the 12th and had called in his absence on the morning of June 13. Mr. Ford told Mr. Strunk about the message on his cell phone about the dropped call. Mr. Struck asked Mr. Ford whether he had redialed the employer and Mr. Ford advised he had not.

Mr. Ford's prior absences in 2006 were as follows. On January 10, Mr. Ford was absent due to illness properly reported to the employer. On February 17, Mr. Ford was enroute to the workplace when he called to notify the employer he would be late due to poor weather conditions. Mr. Ford lived 14-15 miles from the workplace and had provided himself more time than usual for the trip to work. Nonetheless, Mr. Ford was late. On February 8 and 9, Mr. Ford was one minute tardy to work. On February 28, Mr. Ford was absent due to illness properly reported and presented a doctor's excuse upon his return. On May 2, Mr. Ford was absent due to illness properly reported to the employer. The employer issued warnings to Mr. Ford for attendance on February 17, March 1, and May 3, all of which were based, in part, on absences due to illness properly reported to the employer.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Ford was discharged for misconduct in connection with the employment. It does not.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

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).

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. Ford'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 greater weight of the evidence indicates that the final absence on June 13 was an unexcused absence. Mr. Ford knew he had to at least leave a voice mail message for Mr. Strunk and knew there was a distinct possibility that his first attempt to leave a message was unsuccessful. A reasonable person would have made a second call. The evidence indicates that Mr. Ford's absences on January 10, February 28, and May 2 were for illness properly reported to the employer and, therefore, excused absences under the applicable law. The evidence indicates that Mr. Ford's tardiness on February 17 due to poor traveling conditions should be deemed excused because Mr. Ford properly notified the employer, had behaved reasonably in leaving himself additional time to get to work, and the poor driving conditions were simply beyond his control. In other words, the tardiness on that day did not represent a deliberate, intentional, or culpable act. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992). The evidence indicates that Mr. Ford's one-minute tardiness on February 8 and 9 were unexcused absences. Though these two absences were unexcused in nature, the one-minute length of the tardiness is noteworthy. The evidence in the record does not establish excessive *unexcused* absences such as would disqualify Mr. Ford for unemployment insurance benefits. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Ford was discharged for no disqualifying reason. Accordingly, Mr. Ford is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Ford.

DECISION:

The Agency representative's July 12, 2006, reference 01, 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.

jt/pjs