

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MOLENBURG, NEAL, E
Claimant

APPEAL NO. 13A-UI-03476-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**VERMEER MANUFACTURING COMPANY
INC**
Employer

**OC: 02/24/13
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

Neal Molenburg filed a timely appeal from the March 15, 2013, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on April 24, 2013. Mr. Molenburg participated. Cornie Van Walbeek represented the employer and presented additional testimony through Dan Coster and Todd Atchison. Exhibits Two through Seven were received into evidence.

ISSUE:

Whether Mr. Molenburg 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: Neal Molenburg was employed by Vermeer Manufacturing Company as a full-time machine specialist from April 2012 until February 26, 2013, when the employer discharged him for attendance. Claimant's immediate supervisor was Area Manager Todd Atchison. Group Leader Dan Coster also had authority to direct Mr. Molenburg's work. Mr. Molenburg's work hours were 9:30 p.m. to 6:00 a.m. Mr. Molenburg resided in New Sharon and commuted 15 to 20 minutes to the workplace in Pella.

The final incident that triggered the discharge was Mr. Molenburg's early departure from the workplace at 4:00 a.m. on February 22, 2013. Mr. Molenburg was scheduled to work until 6:00 a.m. on that date. At about 3:45 a.m., Mr. Molenburg asked group leader Dan Coster if he could leave work early and use two hours of paid time off to satisfy the employer's requirement that he complete an eight-hour shift. Mr. Molenburg wanted to leave work early due to inclement weather. Mr. Coster told Mr. Molenburg that he could not prevent him from leaving, but that he could face consequences to his employment in light of prior attendance issues. Despite the admonition, Mr. Molenburg left work at 4:00 a.m. Leaving early, in the darkness and prior to the snow plows clearing the roads, was a bad idea and it took Mr. Molenburg much longer than usual to get home. Mr. Molenburg had the next day off.

On February 26, 2013, Mr. Atchison and Cornie Van Walbeek, Human Resources Business Partner, met with Mr. Molenburg to discuss the early departure on February 22. Mr. Molenburg explained that he had requested to leave early due to inclement weather and had requested to use paid time off. Mr. Atchison said he was not approving the request to use paid time off. Mr. Atchison and Mr. Van Walbeek then discharged Mr. Molenburg for attendance.

The next most recent absence that factored into the discharge was an absence due to illness and properly reported to the employer on August 29, 2012. The employer's policy required that the Mr. Molenburg contact Mr. Atchison no later than 30 minutes after the scheduled start of the shift if he needed to be absent. Mr. Molenburg had complied with that policy in connection with the August 29, 2012 absence.

The next most recent absence that factored into the discharge occurred on August 3, 2012. On that day, Mr. Molenburg left the workplace at lunch time and could not return because he had been arrested for driving under suspension. As it turns out, Mr. Molenburg was driving illegally throughout the employment.

The employer considered additional absences when making the decision to end Mr. Molenburg's employment. The employer considered a purported absence on August 2, 2012, but Mr. Molenburg was at work on that day. The next most recent absence that factored was on July 27. On that day, Mr. Molenburg was absent so that he could go to Adventureland. Earlier in the week, Mr. Molenburg had spoken to a substitute Group Leader about his desire to have July 27 off to go to Adventureland. The substitute Group Leader had referred Mr. Molenburg to Mr. Atchison. Mr. Molenburg did not ask Mr. Atchison for the time off. In the middle of the week, the employer notified Mr. Molenburg that he and another employee would have to work on July 27. The employer required that at least two employees work each shift for safety reasons. Mr. Molenburg called in an absence on July 27 so that he could go to Adventureland. On June 6, 2012, Mr. Molenburg was late clocking in because he was in the restroom.

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).

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). Employers may not graft on additional requirements to what is an excused absence under the law. See Gaborit v. Employment Appeal Board, 743 N.W.2d 554 (Iowa Ct. App. 2007). For example, an employee's failure to provide a doctor's note in connection with an absence that was due to illness properly reported to the employer will not alter the fact that such an illness would be an excused absence under the law. Gaborit, 743 N.W.2d at 557.

The weight of the evidence establishes an unexcused absence on February 22, 2013. The weight of the evidence establishes that there was no legitimate reason for Mr. Molenburg to leave work two hours early so that he could travel home in darkness during a snowstorm and before snow plows had been out. What would have made a lot more sense, especially since Mr. Molenburg had the next day off, is if Mr. Molenburg had completed his shift and then waited until daylight came and the roads were plowed. Mr. Molenburg could not legally operate a motor vehicle at the time. Though that particular fact was not misconduct *in connection with the employment*, it further delegitimizes the need to get off work early so that Mr. Molenburg could start his illegal drive home.

The weight of the evidence establishes additional unexcused absences on June 6, July 27, and August 3. On June 6, Mr. Molenburg timed his extended restroom time so that it was in conflict with his work start time. On July 27, Mr. Molenburg intentionally avoided contact with Mr. Atchison about his desire to take time off to go to Adventureland. The absence was never approved, as indicated by the substitute Group Leader's concern when Mr. Molenburg did not show for the shift. The August 3 absence for part of the shift was attributable to

Mr. Molenburg's illegal conduct during his lunch break. The August 29 absence was an absence due to illness properly reported and, therefore, was an excused absence under the applicable law.

The evidence establishes a six and a half month space between the final unexcused absence and the next most recent absence that would be an unexcused absence under the applicable law. Under those circumstances, the administrative law judge concludes that Mr. Molenburg's unexcused absences were not excessive and did not constitute misconduct in connection with the employment that would disqualify Mr. Molenburg for unemployment insurance benefits. Because Mr. Molenburg was discharged for no disqualifying reason, he is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The Agency representative's March 15, 2013, reference 01, decision is reversed. 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/pjs