

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CORY J MACKEY
Claimant

APPEAL NO. 08A-UI-05370-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

VTI ARCHITECTURAL PRODUCTS INC
Employer

**OC: 05/04/08 R: 01
Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

Cory Mackey filed a timely appeal from the May 28, 2008, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on June 25, 2008. Mr. Mackey participated. Kathy Sindt, Human Resources Administrator, represented the employer.

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: Cory Mackey was employed by VTI Architectural Products as a full-time, third-shift production worker from December 5, 2007 until April 16, 2008, when Supervisor Mike Walsh discharged him for attendance. Mr. Mackey's regular work hours were 10:00 p.m. to 6:00 a.m., Monday through Friday.

The employer has a "no fault" attendance policy and assigns attendance points to all absences, including absences due to illness properly reported. Employees who accrue 21 attendance points are subject to discharge from the employment. Mr. Mackey signed his acknowledgment of receipt of the policy on December 5, 2007, and was aware of the attendance policy. The employer's attendance notification policy required that Mr. Mackey notify his immediate supervisor prior to the scheduled start of his shift if he needed to be absent. The employer deemed a voice mail message left for the supervisor acceptable notice of the absence. Mr. Mackey was aware of the attendance notification policy.

The final absence that prompted the discharge occurred on April 16, 2008, when Mr. Mackey did not appear for his shift. That day, at approximately 5:30 p.m., Mr. Mackey had been involved in a motor vehicle collision. Mr. Mackey was taken into custody by law enforcement and transported to the police station. While at the police station, Mr. Mackey requested to make a phone call and contacted his mother. Mr. Mackey had his mother leave a voice mail message for his supervisor indicating that he would not be at work because of an accident. When

Mr. Mackey showed up for work the following evening, Supervisor Michael Walsh told him he was discharged from the employment because he had accrued too many attendance points.

Mr. Mackey's previous absences were as follows. On December 28, 2007, Mr. Mackey was absent due to illness and properly reported the absence. On February 27, 2008, Mr. Mackey was tardy due to a lack of transportation. On March 24 and 25, 2008, Mr. Mackey was absent due to illness and properly notified the employer. On March 27, Mr. Mackey left work early because he had a headache. On March 28, Mr. Mackey was absent because he had traveled to Sioux City and lacked transportation for the return trip. Mr. Mackey knew he had to work at the time he decided to travel to Sioux City. Mr. Mackey reported the absence to the employer after the scheduled start of his shift.

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).

The greater weight of the evidence in the record indicates that the final absence that prompted the discharge was an unexcused absence under the applicable law. The greater weight of the evidence indicates that Mr. Mackey was unable to appear for work on April 16, 2008 because he had been taken into custody by law enforcement in connection with his involvement in a motor vehicle accident. The administrative law judge found Mr. Mackey's answers to questions about the circumstances of his police contact on April 16 unduly vague and evasive. The evidence establishes additional unexcused absences on February 27, March 27, and March 28. The weight of the evidence fails to establish that Mr. Mackey's headache rendered him unable to perform work on March 27 or necessitated his early departure from work on that date. The evidence establishes four excused absences within the final seven weeks of the employment and three unexcused absence within the final three weeks of the employment. The administrative law judge concludes that Mr. Mackey's unexcused absences were excessive and constituted misconduct in connection with the employment.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Mackey was discharged for misconduct. Accordingly, Mr. Mackey 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. Mackey.

DECISION:

The Agency representative's May 28, 2008, reference 01, 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

jet/kjw