

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Fredrick Thompson was employed by Gazette Communications as a full-time material handler/coordinator from December 30, 2002 until September 2, 2005, when Lead Supervisor Doug Heims and Supervisor Carolyn Keller discharged him for excessive unexcused absences. There was no other basis for the discharge.

The employer had a written attendance policy that is set forth in the Packaging & Finishing/Night Packaging Policies & Procedures (March 2004), a copy of which Mr. Thompson received on March 31, 2004. Pursuant to the policy, Mr. Thompson was required to notify the employer as soon as possible, but no later than one hour prior to the scheduled start of his shift, if he needed to be absent. Pursuant to the policy, after three absences due to illness, the employer thereafter required Mr. Thomson to provide a doctor's excuse for any absences.

The final absence that prompted the discharge occurred on September 1, 2005. Mr. Thompson contacted the employer after the scheduled start of his shift to advise that he would be absent due to illness. Mr. Thompson had taken some muscle relaxing medication, fell asleep, and did not contact the employer at least an hour before the scheduled start of his shift. Mr. Thompson had been on muscle relaxing medication for several months and was aware that the medication made him drowsy. Mr. Thompson had been to his doctor that morning, was finished at the doctor's office by 11:30 a.m., but did not contact the employer until after 7:00 p.m. At the time of the appointment, the doctor had provided Mr. Thompson with a medical excuse that released Mr. Thompson from work on August 30 through September 1. On September 2, Lead Supervisor Doug Heim placed Mr. Thompson on suspension, pending a decision regarding whether he would be terminated. By letter dated September 4, 2005, the employer advised Mr. Thompson that his employment was being terminated because of the history of unexcused absences and failure to follow the employer's notification policy.

Mr. Thompson had also been absent on August 31, 2005. Mr. Thompson contacted the employer at 4:51 p.m. to advise that he would not be in for his 5:30 p.m. shift due to illness.

Mr. Thompson's prior absences due to reasons other than illness properly reported to the employer were as follows. On March 21, 2005, Mr. Thompson was tardy because he overslept. On May 24, 2005, Mr. Thompson was absent from work because he had gone to Mississippi to be with his family and decided to extend his vacation and delay his return to Iowa. On May 23, Mr. Thompson had contacted Floor Supervisor Terry Burke and requested May 24 through May 26 off. Ms. Burke advised Mr. Thompson that he would need to make the request to Lead Supervisor Dough Heims. Mr. Thompson was angry that he had been asked to contact a second supervisor and delayed contacting Mr. Heims. At 1:00 p.m. on May 24, Mr. Thompson contacted Mr. Heims, who indicated that the absences for May 24 through May 26 would be deemed unexcused. On June 6, Mr. Thomson was absent without notifying the employer.

Mr. Thompson's prior warnings for attendance issues were as follows. On April 5, Supervisor Dough Heims issued Mr. Thompson a written warning. On June 1, Mr. Thompson received a second written warning and was suspended for one day. On June 14, Mr. Thompson received a third written warning and was suspended for three days. Also on June 14, Supervisor Matt Ricklefs provided Mr. Thompson with written notification that Mr. Thompson would be required to provide doctor's excuse for any absences occurring during the remainder of the calendar year. The notification also reminded Mr. Thompson of his obligation to follow the employer's policy and protocol with regard to reporting an absence. In addition, Supervisor Matt Ricklefs

reviewed the attendance policy with Mr. Thompson to make certain Mr. Thompson was clear on his obligations under the policy.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Thompson was discharged for misconduct in connection with his employment based on excessive unexcused absences.

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(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

Because the claimant was discharged, the employer bears 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 Mr. Thompson's absences to constitute misconduct that would disqualify him from receiving unemployment insurance benefits, the evidence must establish that Mr. Thompson'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 evidence in the record establishes that the final absence, that of September 1, was an unexcused absence because the absence due to illness was not properly reported to the employer. The evidence further establishes the August 31 absence was also unexcused for the

same reason. Mr. Thompson's tardiness on March 21, absences on May 24, 25, and 26, and the "no call, show": on June 6 were also unexcused.

In light of the several warnings Mr. Thompson received for excessive unexcused absences and for failure to follow the employer's notification policy, and in light of the unexcused absences referenced above, the administrative law judge concludes that Mr. Thompson's unexcused absences were excessive and that Mr. Thompson was indeed discharged for misconduct. Accordingly, Mr. Thompson 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 will not be charged for benefits paid to Mr. Thompson.

The administrative law judge has carefully considered Mr. Thompson's assertion that his discharge was based, at least in part, on racial discrimination. The evidence in the record does not support such a conclusion.

DECISION:

The Agency representative's decision dated September 20, 2005, reference 01, is affirmed. The claimant was discharged for misconduct in connection with the employment, to wit, excessive unexcused absences. The claimant 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 will not be charged for benefits paid to the claimant.

jt/s