

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MICHAEL J SMITH**  
Claimant

**APPEAL NO. 09A-UI-19470-VST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CDS GLOBAL INC**  
Employer

**OC: 11/15/09**  
**Claimant: Appellant (1)**

Section 96.5-2-a – Misconduct

**STATEMENT OF THE CASE:**

Claimant filed an appeal from a decision of a representative dated December 22, 2009, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on February 8, 2010. Claimant participated. Employer participated by Chris Croat, senior employment relations specialist; and Vickie Carra, production manager. The record consists of the testimony of Chris Croat; the testimony of Vickie Carra; the testimony of Michael Smith; and Employer's Exhibits 1-9.

**ISSUE:**

Whether the claimant was discharged for misconduct.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is in the magazine fulfillment business. The claimant was hired on August 21, 2006, as a products processing specialist. He worked full time. He was terminated on November 20, 2009, for excessive absenteeism and tardiness.

The incident that led to the claimant's termination occurred on November 19, 2009. The claimant left a voice mail message for his supervisor saying that he would be working from 9:00 a.m. to 5:00 p.m. that day. His normal hours were 7:00 a.m. to 3:30 p.m. The claimant did not actually come to work until 9:32 a.m. His reason for coming late was that he had overslept.

On November 12, 2009, the claimant had been issued a second written warning for attendance violations. He had accumulated a total of 79.25 hours of absenteeism and tardiness. He was tardy on 8 occasions. Although a majority of his absences were due to illness, he was also absent as a result of being locked out of his car and for personal issues. He was informed that if he had any further violations of the attendance policy, he could be terminated. That was the

next stage in the employer's progressive disciplinary system. The first written warning had come on August 20, 2009.

### **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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Excessive unexcused absenteeism is one form of misconduct. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The concept includes tardiness. Absence due to matter of "personal responsibility", e.g., transportation problems and oversleeping is considered unexcused. See Harlan v. IDJS, 350 N.W.2d 192 (Iowa 1984). The employer has the burden of proof to show misconduct.

The evidence in this case established that the claimant was excessively absent and tardy. Although the majority of the claimant's absences were due to illness, the most recent absences were due to transportation problems and personal business in court. In addition there were eight incidents of tardiness, the most recent due to oversleeping. The claimant had received written warnings concerning attendance in August 2009 and November 2009. He knew that his job was in jeopardy. Despite that knowledge, the claimant was late due to oversleeping on November 19, 2009. This is not an excused absence.

The greater weight of the evidence is that the claimant's absences were both excessive and unexcused. The employer has shown misconduct. Benefits are denied.

**DECISION:**

The decision of the representative dated December 22, 2009, reference 01, is affirmed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible.

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Vicki L. Seeck  
Administrative Law Judge

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Decision Dated and Mailed

vls/pjs