

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NOBLE T MOTHERSHEAD
Claimant

APPEAL NO. 09A-UI-17721-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

NSK CORPORATION
Employer

OC: 11/23/08
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism
871 IAC 24.32(8) – Current Act

STATEMENT OF THE CASE:

The employer appealed a department representative's decision dated November 17, 2009, reference 03, that held the claimant was not discharged for excessive unexcused absenteeism on October 25, 2009, and benefits are allowed. A telephone hearing was held on December 17, 2009. The claimant participated. Lynda Swanson, HR Senior Administrator, participated for the employer. Employer Exhibits One through Five were received as evidence.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses, and having considered the evidence in the record, finds that: The claimant began work on October 22, 2007, and last worked for the employer as a full-time water pump/machine operator on October 23, 2009. The claimant received the employer attendance policy that provides for progressive discipline from a first offense verbal counseling to a second offense written warning to a third offense suspension to a fourth offense termination. The employer had no issue with the claimant properly reporting his absences.

The claimant received progressive discipline warnings for excessive absenteeism from a verbal counseling on May 14, 2008 to a last chance warning on August 18, 2009. From July 22nd to discharge, the claimant was absent for a non-job-related injury (July 23 – 27), job-related injury (August 14 – October 5, 6), personal illness (October 8/9), and a worker's compensation doctor's appointment on October 16. The claimant left early with supervisor permission due to illness on October 20, and called in the following day that he would miss work for the same reason. The employer discharged the claimant on October 23, 2009 for excessive absenteeism (4.46%) in light of progressive discipline for repeated violations of the employer attendance policy. The attendance policy does not consider the reason for absence.

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(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

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.

The administrative law judge concludes that the employer failed to establish misconduct and/or any current act of misconduct in the discharge of the claimant on October 23, 2009, for excessive "unexcused" absenteeism.

While the employer may have been justified to discharge the claimant according to its attendance/disciplinary policy, it does not consider the reason for absence. Absences due to properly reported illness or injury are excusable, and do not constitute job disqualifying misconduct. The department regulations and case law focus on the reason for absence, not the number of absences. The claimant's period of absence from July 22 to discharge were for excusable reasons.

DECISION:

The decision of the representative dated November 17, 2009, reference 03, is affirmed. The claimant was not discharged for misconduct in connection with employment on October 23, 2009. Benefits are allowed, provided the claimant is otherwise eligible.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/pjs