

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DONALD E ANSLEY
Claimant

APPEAL NO. 08A-UI-10643-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

EMCO ENTERPRISES INC
Employer

OC: 01/06/08 R: 02
Claimant: Respondent (1)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, Emco, filed an appeal from a decision dated November 3, 2008, reference 03. The decision allowed benefits to the claimant, Donald Ansley. After due notice was issued, a hearing was held by telephone conference call on December 2, 2008. The claimant participated on his own behalf. The employer participated by Senior Human Resources Representative Mary Bordwell and was represented by TALX in the person of Craig Cree.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Donald Ansley was employed by EMCO from August 31, 2006 until September 24, 2008 as a full-time production worker. He received a copy of the employee handbook on August 31, 2006, which set out the attendance and disciplinary policies. The employer has a no-fault attendance policy, and doctor's excuses will only affect the overall percentage of absenteeism if it covers more than three days of absence.

Mr. Ansley received three-day suspensions without pay on May 22 and August 26, 2008, for exceeding the five percent absenteeism level in a rolling 12-month period. Under the progressive disciplinary policy, the next step is discharge. The claimant was absent on September 15, 2008, for an illness that he properly reported to his supervisor prior to the start of the shift. He provided a doctor's excuse to the employer when he returned to work. However, as the attendance policy is no-fault, the absence was counted against him. When the weekly calculation was done on September 23, 2008, the claimant had again exceeded the five percent allowable absenteeism rate and was discharged.

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.

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.

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.

The claimant was discharged for exceeding the allowed five percent absenteeism rate. Under the provisions of the above Administrative Code section, excessive, unexcused absenteeism is misconduct. However, the other Administrative Code section does require there to be a current, final act of misconduct precipitating the discharge before disqualification may be imposed. A properly reported illness cannot be considered misconduct, as it is not volitional. Cosper v.

IDJS, 321 N.W.2d 6 (Iowa 1982). Mr. Ansley properly reported his absence and had a doctor's excuse which he gave to the employer. The final incident of absenteeism that caused the discharge is not misconduct and disqualification may not be imposed.

DECISION:

The representative's decision of November 3, 2008, reference 03, is affirmed. Donald Ansley is qualified for benefits, provided he is otherwise eligible.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/kjw