

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CAREY L GROVE
Claimant

APPEAL NO. 09A-UI-06532-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

VANTEC INC
Employer

**Original Claim: 04/05/09
Claimant: Appellant (2)**

Section 96.5-2-a – Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from a representative's decision dated April 22, 2009, reference 01, which held the claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on May 21, 2009. The claimant participated. The employer participated by Brittany Sickels, human resources manager. The record consists of the testimony of Brittany Sickels, the testimony of Carey Grove, and Employer's Exhibits 1 through 7.

ISSUE:

The issue in this matter 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 all of the evidence in the record, makes the following findings of fact:

The claimant began his employment on August 13, 2008, as an entry level production worker. The employer has a written attendance policy that gives eight points to an employee. If the employee violates the attendance policy, points are deducted. When an employee reaches a zero balance, termination occurs.

In this case, the claimant accumulated a negative balance of one and one half point on April 1, 2009. He was then terminated by the employer on April 3, 2009. He was assessed four and one half points on April 1, 2009. He had called in, saying he would be late due to car trouble. The claimant did not have a phone and had borrowed the cell phone of a passer-by to make the initial call to this employer. He was docked .5 points for a late call. He was unable to get his car repaired and unable to make it to work or to call his employer. He was then docked an additional 4 points, making a total of 4.5 points for this one day.

Prior to April 1, 2009, the claimant was docked 1 point for failing to punch out at the end of his shift. The claimant simply forgot to do this. He also had two absences for being sick and not having a doctor's note and one time he was absent because he did not have a ride. He also

had one no-call, no-show on April 21, 2008. On February 28, 2009, one point was restored to the claimant as a perfect attendance bonus.

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(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 gravity of the incident, number of policy violations, and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation. The Iowa Supreme Court has opined that one unexcused absence is not misconduct even when it followed nine other excused absences and was in violation of a direct order. Sallis v. EAB, 437 N.W.2d 895 (Iowa 1989). Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984), held that the absences must be both excessive and unexcused. The Iowa Supreme Court has held that excessive is more than one. Three incidents of tardiness or absenteeism after a warning has been held misconduct. Clark v. Iowa Department of Job Service, 317 N.W.2d 517 (Iowa App. 1982). While three is a

reasonable interpretation of excessive based on current case law and Webster's Dictionary, the interpretation is best derived from the facts presented.

In this case, the employer has not shown that the claimant was discharged for misconduct that disqualified him from receiving unemployment benefits. The final incident that led to claimant's termination cost the claimant four and one-half points, which exhausted his supply of points. This incident was essentially a no-call, no-show, and yet the claimant was penalized for being late, for never showing up for work, and for no second call. On April 21, 2008, the claimant was only penalized one point for a no-call, no-show. There was only one written warning on January 28, 2009, at which point the claimant was at three points. He then got a perfect-attendance bonus on February 28, 2009.

Although the claimant did have some absences that were not excused, those absences were not excessive at the time of his termination. Accordingly, it is determined that the claimant is entitled to benefits if he is otherwise eligible.

DECISION:

The decision of the representative dated April 22, 2009, reference 01, is reversed. Unemployment insurance benefits are allowed, provided the claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/kjw