

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MATTHEW D GAUDREAU
Claimant

APPEAL NO. 09A-UI-14762-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

**ELECTRICAL ENGINEERING
& EQUIPMENT CO**
Employer

**Original Claim: 08/30/09
Claimant: Appellant (2)**

Section 96.5-2-a – Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from a representative's decision dated September 23, 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 October 28, 2009. The claimant participated. The employer failed to respond to the hearing notice and did not participate. The record consists of the testimony of Matthew Gaudreau.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

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

The employer in this case is an electrical supply company. The claimant was a full-time employee in the warehouse. He was initially hired on March 12, 2007. He was terminated on August 31, 2009, for attendance.

The claimant had started taking classes on August 24, 2009, in the morning. Management and human resources had no objection to the claimant's classes, but the claimant's immediate supervisor did. The claimant wanted to attend class in the morning and then work his requisite hours. The claimant had been led to believe back in June 2009 that this would be satisfactory. The claimant tried to get night classes but was unable to do so. He intended to use his paid personal time off in the mornings until he could get his schedule adjusted.

The claimant requested August 27, 2009, and August 28, 2009, off. He was going to attend a funeral on August 27, 2009, of a close friend and felt he would need an extra day. He had paid personal time available. Unbeknownst to the claimant, his manager only approved August 27, 2009. When the claimant came to work on Monday, August 31, 2009, he was informed he had

been terminated for a no-call, no-show on August 28, 2009, and for being late on August 31, 2009. He had no prior warnings for attendance.

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 leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the workers' 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 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.

The employer in this case has failed to sustain its burden of proof to show misconduct. There is no showing of excessive absenteeism. The highest level to which the employer's evidence rises is two absences. The claimant thought he had properly requested the time off and had personal paid leave to cover those absences. The employer elected not to participate in the hearing and there is no testimony concerning the attendance policy or the reason why the claimant was terminated. Two unexcused absences, even if there were two such absences, is not excessive absenteeism. Benefits are allowed if the claimant is otherwise eligible.

DECISION:

The representative's decision dated September 23, 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