

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KEVIN L VANDEHOEF
Claimant

APPEAL NO. 09A-UI-06040-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

SUDENGA INDUSTRIES INC
Employer

**OC: 03/15/09
Claimant: Appellant (1)**

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant, Kevin Vandehoef, filed an appeal from a decision of a representative dated April 10, 2009, reference 02, which held that the claimant was ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on May 11, 2009. Claimant participated personally. Employer participated by Chuck Sjoegren, Human Resources Manager, and James Timmerman, department supervisor. Steve Thompson, the claimant's brother-in-law also participated in the hearing.

ISSUE:

The issue in this matter is whether claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: The claimant last worked for employer on March 9, 2009. He was discharged on March 9, 2009, by the employer due to excessive absenteeism and tardiness. The claimant began working for the employer on September 4, 2007. He was hired as a production employee and initially worked on third shift.

During his tenure with the company the claimant was given six formal reprimands for no-call/no-show. He was suspended two separate times without pay. In addition he had 25 days of unpaid absence from work. In the year 2009 alone, the claimant had three tardies. On March 6, 2009, the claimant did not call in and did not show up for work. His supervisor, James Timmerman, prepared a written warning slip and when the claimant returned to work he was terminated for his fourth no-call/no-show. The previous dates were March 14, 2008; July 11, 2008; and September 15, 2008. The claimant testified that he did call in on March 6, 2009, but he was unable to say with whom he spoke when he called in.

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.

The evidence in this case showed that the claimant violated the employer's attendance policy numerous times. He failed to call in his absence on four separate occasions and had received six formal reprimands together with days off without pay. In addition, he was late three times in 2009 alone. His testimony that he did not know the employer's attendance policy is not credible given his no-shows together with his formal reprimands, written warnings and days off without pay. The claimant's testimony that he did call in on March 6, 2009, is also not credible, particularly since the claimant did not know with whom he spoke about his attendance at work on that date. An employer can reasonably expect that an employee will be at work and on time. The claimant's actions in violating the employer's attendance policy constitute misconduct on the claimant's part.

DECISION:

The decision of the representative dated April 10, 2009, reference 02, 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.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs