

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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**DARREN JOHNSON**  
Claimant

**S-L SNACKS IA LLC**  
Employer

**APPEAL NO. 14A-UI-05598-B2T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 05/04/14**  
**Claimant: Appellant (2)**

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Iowa Code § 96.5-2-a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Claimant filed an appeal from a decision of a representative dated May 28, 2014, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on June 23, 2014. Claimant participated personally. Employer participated by Melissa Stiffler. Employer's Exhibits A-C were admitted into evidence.

**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: Claimant last worked for employer on May 1, 2014. Employer discharged claimant on May 12, 2014 because of excessive tardiness and absenteeism.

Employer had a policy in its Associates' Handbook that explains points accumulated through lack of attendance and tardiness. An incident of tardiness yields one-half point. A part day absence, self-report of sickness, weather day, or home duty day yields one point per incident. A no-call/no-show incident yields four points. Employer stated that a no-call/no-show incident was treated the same if it were to occur within a normal shift, or if it were to occur in a mandatory overtime shift wherein employees are given a minimum of twelve hours' notice of their obligation to work, but could not find a specific reference within the Handbook. Eight occurrences (points) within a rolling calendar twelve-month period yield termination. Claimant had received a coaching when he had accumulated 4½ points, a first written warning at five points, and a second written warning at six points. Claimant then secured four additional points on the mandatory overtime shift of Saturday, May 3 when he did not call or report for the shift.

Employer stated that some other shift manager had investigated the incident that led to claimant's job separation and found the posting to be proper. That person was not made available for the hearing. Claimant stated that on the day in question he and all of his coworkers looked at the posting board immediately prior to leaving work but did not find overtime hours listed. Claimant stated that he always volunteered to work overtime, so if there

were overtime hours given out, he would have been sure to be there. Employer listed the last five paychecks, which showed claimant not working overtime hours.

**REASONING AND CONCLUSIONS OF LAW:**

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(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.

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate

the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

The employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Dep't of Job Serv., 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. Infante v. Iowa Dep't of Job Serv., 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. Pierce v. Iowa Dep't of Job Serv., 425 N.W.2d 679 (Iowa Ct. App. 1988).

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 Ct. 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 matter, the evidence did not establish that claimant was discharged for an act of misconduct when claimant violated employer's policy concerning absenteeism. Claimant's last absence was as a result of a mandatory overtime which claimant states were not put up on the attendance board. Employer only offered notes stating that a worker looked into this situation prior to the discharge, but that person was not made available for hearing.

The last incident, which brought about the discharge, fails to constitute misconduct because the employer has not shown that the overtime requirement was placed on the attendance board in such a timely fashion that claimant could alter his schedule to adhere to the last minute adjustment. The administrative law judge holds that claimant was not discharged for an act of misconduct and, as such, is not disqualified for the receipt of unemployment insurance benefits.

**DECISION:**

The decision of the representative dated May 28, 2014, reference 01, is reversed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

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Blair A. Bennett  
Administrative Law Judge

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Decision Dated and Mailed

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