

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**TIM J MALENOSKY**  
Claimant

**APPEAL NO. 14A-UI-01328-S2T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**ALL POWER INC**  
Employer

**OC: 01/05/14**  
**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Tim Malenosky (claimant) appealed a representative's January 27, 2014, decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits because he was discharged from work with All Power (employer) for excessive unexcused absenteeism after having been warned. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for February 26, 2014. The claimant participated personally. The employer participated by Roger Braesch, General Manager. The employer offered and Exhibit One was received into evidence.

**ISSUE:**

The issue is whether the claimant was separated from employment for any disqualifying reason.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on June 10, 2012, as a full-time shipping receiving clerk, working 7:00 a.m. to 3:30 p.m. The employer has a handbook. The one copy of the handbook is in the possession of the owner. The general manager believes the handbook to be in excess of fifty pages. The general manager believes that proper reporting of an absence to be calling the employer before 8:00 a.m. on the day of the employee's shift. The claimant never saw the handbook or its policies. He heard from co-workers that he was supposed to call the employer to report his absences. He always reported his absences before the start of his shift.

On December 7, 2012, the employer issued the claimant a written warning for tardiness. The claimant overslept and had car problems. On October 28, 2013, the employer issued the claimant a written warning for absenteeism and tardiness. On November 25, 2013, the employer issued the claimant a written warning for absence due to a properly reported illness. On December 9, 2013, the employer issued the claimant a written warning for absenteeism. The employer notified the claimant each time that further infractions could result in termination from employment.

On January 2, 2014, the claimant properly reported his absence due to illness. He called the employer and left a message at approximately 6:45 a.m. on January 2, 2014. On January 3, 2014, the employer terminated the claimant.

**REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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 employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incident of

absence was a properly reported illness which occurred on January 2, 2014. The claimant's absence does not amount to job misconduct because it was properly reported. The employer has failed to provide any evidence of willful and deliberate misconduct which would be a final incident leading to the discharge. The claimant was discharged but there was no misconduct.

**DECISION:**

The representative's January 27, 2014, decision (reference 01) is reversed. The employer has not met its proof to establish job related misconduct. Benefits are allowed.

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Beth A. Scheetz  
Administrative Law Judge

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Decision Dated and Mailed

bas/pjs