

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

GARY W SWIMS

Claimant

APPEAL NO. 08A-UI-09987-MT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ALUMINUM CO OF AMERICA

DAVENPORT WORKS

Employer

**OC: 08/03/08 R: 04
Claimant: Respondent (1-R)**

Section 96.5-2-a – Suspension or Discharge for Misconduct

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated October 16, 2008, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on November 12, 2008. Claimant participated personally. Employer participated by Jill Williams, Human Resource Generalist. Exhibit One was admitted into evidence.

ISSUE:

The issue in this matter is whether claimant was suspended 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 September 2, 2008.

Claimant was suspended on August 1, 2008 through August 31, 2008 by employer because claimant was absent due to illness July 9, 2008. Claimant properly reported the absence pursuant to policy. Claimant was taken off work by a doctor effective September 2, 2008 and has been off work to date of hearing. Claimant received \$427.00 per week starting September 8, 2008 in sickness and accident benefits to date of hearing.

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. 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 fails to establish that claimant was suspended for an act of misconduct when claimant violated employer's policy concerning absenteeism. Claimant was warned concerning this policy.

The last incident, which brought about the suspension, fails to constitute misconduct because the final incident was the result of illness. Absenteeism due to illness is excusable if properly reported. As such the suspension was not the result of misconduct. The administrative law judge holds that claimant was not suspended for an act of misconduct and, as such, is not disqualified for the receipt of unemployment insurance benefits.

This matter is remanded to claims for a determination of Claimant's eligibility for work effective September 2, 2008 and ongoing.

DECISION:

The decision of the representative dated October 16, 2008, reference 01, is affirmed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements. This matter is remanded to claims for a determination of whether claimant is able and available for work effective September 2, 2008 and ongoing.

Marlon Mormann
Administrative Law Judge

Decision Dated and Mailed

mdm/pjs