

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOE L DOUTHART
Claimant

APPEAL NO. 08A-UI-09806-MT

**ADMINISTRATIVE LAW JUDGE
DECISION**

NORDVIK INDUSTRIES INC
Employer

**OC: 09/07/08 R: 03
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated October 13, 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 6, 2008. Claimant participated personally. Employer participated by Derek Nordvik, General Manager and Susan Nordvik, President. Exhibit One was admitted into evidence.

ISSUE:

The issues in this matter are whether claimant was discharged for misconduct and is overpaid unemployment insurance benefits.

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 the employer September 2, 2008.

Employer discharged claimant on September 3, 2008 because claimant missed a day of work on September 2, 2008. Claimant had been previously reprimanded for absenteeism. Claimant asked for September 2, 2008 off so he could work on his roof. The request was denied. Claimant called in absent on September 2, 2008 and said his wife was very ill. Claimant said he wanted the day off to take his wife to the doctor. Employer asked claimant to bring in proof that he was at the doctor's office on September 2, 2008 but claimant failed to do so. Claimant had many prior absences on his record. Employer failed to specify any particular absences that were for inexcusable reasons.

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.

The administrative law judge holds that the evidence has failed to establish that claimant was discharged for an act of misconduct when claimant violated the employer's policy concerning absenteeism. Claimant was warned concerning this policy.

The last incident, which brought about the discharge fails to constitute misconduct because employer failed to prove that the unexcused absences were excessive. Employer was unable to establish any prior unexcused absences by day and reason for absence. While the last absence is not excused there are insufficient prior absences to prove excessive unexcused absenteeism. Therefore, 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 October 13, 2008, reference 01, is affirmed. Claimant is entitled to unemployment benefits

Marlon Mormann
Administrative Law Judge

Decision Dated and Mailed

mdm/pjs