

IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI

WAYNE R SIMMONS  
217 S WILSON ST  
KNOXVILLE IA 50138

PARSONS BROTHERS CONCRETE  
CONSTRUCTION INC  
PO BOX 551  
ALTOONA IA 50009

Appeal Number: 06A-UI-01590-JTT  
OC: 01/15/06 R: 02  
Claimant: Appellant (2)

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5(2)(a) – Discharge for Misconduct  
871 IAC 24.32(7) – Excessive Unexcused Absences

STATEMENT OF THE CASE:

Wayne Simmons filed a timely appeal from the February 3, 2006, reference 02, decision that denied benefits. After due notice was issued, a hearing was held on February 27, 2006. Mr. Simmons participated. President and owner Troy Parsons represented the employer. Exhibit A was received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Wayne Simmons was employed by Parsons Brothers Concrete Construction as a full-time concrete laborer/finisher from March 2005 until August 10, 2005, when President and owner Troy Parsons discharged him for excessive absences. The final absence occurred on August 10, 2005. When Mr. Simmons contacted his immediate supervisor, Foreman Luke Fife, to notify

Mr. Fife of that Mr. Simmons was still ill and would be absent, Mr. Fife directed Mr. Simmons to contact Mr. Parsons and provided a telephone number for Mr. Parsons. Mr. Simmons immediately telephoned Mr. Parsons. During the telephone conversation, Mr. Parsons advised Mr. Simmons that his services were no longer needed and that he had hired a replacement for Mr. Simmons.

Mr. Simmons' absence on August 10 was the third or fourth consecutive absence. For each absence, Mr. Simmons contacted Mr. Fife and advised that he was ill. Mr. Simmons had advised Mr. Fife that he had bronchitis and pneumonia. Mr. Fife had advised Mr. Simmons that he did not want him to return to work while he was still sick because he did not want the other employees to get sick. On August 9, at the same time Mr. Simmons advised Mr. Fife that he was ill, he also advised Mr. Fife that his girlfriend had suffered a miscarriage and that he needed to go to the doctor with her.

The employer has no written attendance policy. The employer's practice is to inform new employees of their obligation to contact Troy Parsons if they need to be absent from work. Mr. Parsons does not recall whether Mr. Simmons was advised of this policy. Mr. Simmons was, in fact, not advised to contact Mr. Parsons regarding absences prior to speaking with Mr. Fife on an August 10, at which time Mr. Fife provided Mr. Simmons with Mr. Parsons' telephone number. Mr. Simmons had asked Mr. Fife whom he was supposed to contact in the event that he needed to be absent and Mr. Fife told Mr. Simmons that he could contact either Mr. Fife or Mr. Parsons.

Mr. Simmons rode to work from Knoxville with other employees. At some point, one or more of these employees advised the employer that they had seen Mr. Simmons at the Knoxville national car races during the days he was absent. Mr. Simmons had, in fact, not been at car races because he had been too ill.

#### REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Simmons was discharged for misconduct in connection with his employment based on excessive unexcused absences. It does not.

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(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

Because the claimant was discharged, the employer bears the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

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. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

In order for Mr. Simmons' absences to constitute misconduct that would disqualify him from receiving unemployment insurance benefits, the evidence must establish that his unexcused absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

The evidence in the record establishes that all of Mr. Simmons' absences were for illness properly reported to the employer and, therefore, excused absences. Mr. Simmons provided phone records as proof that he had telephoned the employer on each day he was absent. The employer's testimony, offered in light of the phone records, contradicted the employer's earlier statements to the factfinder that Mr. Simmons had made no effort to contact the employer during the days of absence. The employer provided insufficient evidence to corroborate its allegations that Mr. Simmons' absences were for reasons other than the illness. The employer had the ability to present testimony from Mr. Fife or the employees who allegedly saw Mr. Fife at the Knoxville national car races, but failed to do that. The administrative law judge concludes that such testimony would have revealed deficiencies in the employer's case. The record fails to establish a current act of misconduct that might serve as a basis for disqualifying Mr. Simmons for unemployment insurance benefits. See 871 IAC 24.32(8). Accordingly, Mr. Simmons is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Simmons.

#### DECISION:

The representative's decision dated February 3, 2006, reference 02, is reversed. The claimant was discharged from his employment for no disqualifying reason. The claimant is eligible for benefits, provided he meets all other eligibility requirements. The employer's account may be charged.

jt/s