

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NICHOLAS J BAIR
Claimant

APPEAL NO. 12A-UI-06456-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

JENSEN BUILDERS LTD
Employer

OC: 05/06/12
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism
871 IAC 24.32(8) – Current Act

STATEMENT OF THE CASE:

The employer appealed a department representative's decision dated May 24, 2012, reference 01, that held the claimant was not discharged for misconduct on May 7, 2012 and which allowed benefits. A hearing was held on June 25, 2012. The claimant did not participate. Tom Nelson, HR director, participated for the employer.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witness and having considered the evidence in the record, finds that: The claimant worked as a full-time concrete laborer from June 23, 2009 to May 7, 2012. The claimant received the employer's attendance policy, which provides three or more unexcused absences within a six-month period is grounds for termination.

The claimant received verbal warnings on March 22 and April 12 for absences. He called in an absence due to illness before the start of his work shift on May 3. He was discharged for excessive unexcused absences on May 7.

The claimant failed to respond to the hearing notice. Although he filed an unemployment claim, the department record does not show he has claimed for and received any benefit.

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(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.

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 administrative law judge concludes that the employer failed to establish a current act of misconduct in the discharge of the claimant on May 7, 2012, for excessive "unexcused" absenteeism.

An absence due to a properly reported absence due to illness is not misconduct, and this is the most recent incident employer relies upon for discharge.

DECISION:

The representative's decision dated May 24, 2012, reference 01, is affirmed. The claimant was not discharged for a current act of misconduct in connection with employment on May 7, 2012. Benefits are allowed, provided the claimant is otherwise eligible.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/kjw