

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**GAWAIN N REIFF**  
Claimant

**APPEAL NO. 07A-UI-03656-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**W BOYD JONES**  
Employer

**OC: 03/11/07 R: 01  
Claimant: Respondent (5-R)**

Iowa Code section 96.5(2)(a) – Discharge for Misconduct  
Iowa Code section 96.4(3) – Able & Available

**STATEMENT OF THE CASE:**

W. Boyd Jones filed a timely appeal from the April 4, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on April 24, 2007. Claimant Gawain Reiff participated. Donna Prugger, Accounting Assistant, represented the employer. The administrative law judge took official notice of the Agency's record of benefits paid to Mr. Reiff and received Exhibits A and B into evidence.

**ISSUE:**

Whether Mr. Reiff was discharged for misconduct in connection with the employment that disqualifies him for unemployment insurance benefits.

Whether Mr. Reiff has been able to work and available for work since establishing his claim for benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Reiff was employed by W. Boyd Jones Construction Company as a full-time laborer from July 24, 2006 until September 5, 2006, when Project Manager Mike Jacoby discharged him for attendance. The employer lacks a written attendance policy. Mr. Reiff had been assigned to work on a construction project at Offit Air Force Base in Omaha, Nebraska. Project Superintendent Allen Fenderson supervised Mr. Reiff's employment at the job site. Mr. Fenderson is still with the employer but did not testify.

The final absence that prompted the separation occurred on September 1, 2006, when Mr. Reiff was absent due to a work-related back injury. On that day, Mr. Reiff notified Mr. Fenderson that he would be absent due to the injury and that he believed the injury was work-related.

Mr. Reiff was also absent from work on August 28 and 29, due to the injury to his back. On August 28, Mr. Reiff did not have Mr. Fenderson's telephone number, so he drove to the job site to get the telephone number. Mr. Reiff spoke directly to Mr. Fenderson and notified

Mr. Fenderson that he had hurt his back. On August 29, Mr. Reiff telephoned Mr. Fenderson prior to 9:00 a.m. to say that his back was still sore and that he would be absent from work. Mr. Reiff reported for work on August 30 and 31. On September 1, Mr. Reiff contacted Mr. Fenderson, advised that he would be absent due to his back and indicated that he believed the back injury was work-related. Mr. Reiff was not scheduled to work on September 2, 3, or 4, Labor Day weekend.

On September 5, Mr. Reiff telephoned Mr. Fenderson, who directed Mr. Reiff to call the employer's office. Mr. Reiff called the employer's office and spoke to Project Manager Mike Jacoby, who advised Mr. Reiff that he was being "laid off." The employer's documentation concerning the separation references "lay off" in the heading of the document, but the body of the document references Mr. Reiff's three absences as the basis for the separation. Mr. Jacoby is still with the employer, but did not testify.

Mr. Reiff underwent evaluation and treatment for his back condition and was released to return to work without restrictions in October 2006.

Mr. Reiff established a claim for unemployment insurance benefits that was effective March 11, 2007 and has received benefits.

#### **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.

The employer has the burden of proof in a discharge 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).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8).

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). The administrative law judge notes that the employer has failed to provide any testimony from Mr. Fenderson or Mr. Jacoby, the two people most directly involved in Mr. Reiff's employment and separation from the employment. The employer's witness had minimal, if any, firsthand information concerning the details of Mr. Reiff's employment and/or separation from the employment.

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's *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 greater weight of the evidence in the record indicates that Mr. Reiff was discharged from the employment. The evidence in the record fails to establish, by a preponderance of the evidence, a final unexcused absence. On the contrary, the evidence indicates that the final absence on September 1 was for illness and that Mr. Reiff took reasonable steps to report the absence to the employer in the absence of a formal attendance policy. The administrative law judge concludes that the final absence on September 1 was an excused absence under the applicable law. For the same reasons, the administrative law judge concludes that the absences on August 28 and 29 were also excused absence under the applicable law. The evidence fails to establish a "current act" of misconduct, upon which a disqualification for unemployment insurance benefits must be based. See 871 IAC 24.32(8).

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Reiff was discharged for no disqualifying reason. Accordingly, Mr. Reiff is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Reiff.

Iowa Code section 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

871 IAC 24.22(1)a, (2) provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

(2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

As noted above, the greater weight of the evidence in the record establishes a discharge, not a temporary layoff. Accordingly, Mr. Reiff is required to actively and earnestly search for work. The greater weight of the evidence in the record establishes that Mr. Reiff has been able to work since establishing his claim for benefits. The greater weight of the evidence in the record also establishes that Mr. Reiff has been available for work since establishing his claim for benefits. However, the administrative law judge notes that the Agency has erroneously classified Mr. Reiff as a group "6" claimant. Group "6" claimants are those individuals whose occupations are of a nature that utilize résumés or who are normally unable, due to factors such as occupation, distance, etc., to make in-person contacts for employment.

871 IAC 24.1(1)(b)(6). Mr. Reiff does not fall into that category of claimants. The evidence also indicates that Mr. Reiff has not been job attached to this employer since September 5, 2006, and, accordingly, is not a group "1" claimant. See 871 IAC 24.2(1)(b)(1). Mr. Reiff should instead be categorized as a group "2" claimant and be required to make in-person job contacts. See 871 IAC 24.2(1)(b)(2). This matter will be remanded to a claims representative so that the Agency can correctly categorize Mr. Reiff as a group "2" claimant.

**DECISION:**

The claims representative's April 4, 2007, reference 01, decision is modified as follows: The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged. The claimant has been able to work and available for work since establishing his claim for benefits. The claimant has been erroneously classified as a group "6" claimant. The matter is remanded so that the claimant can be correctly classified as a group "2" claimant and be required to make in-person job contacts.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/kjw