

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JARED H CULLEN
Claimant

APPEAL NO. 07A-UI-02499-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FRANK BAXTER GENERAL CONTRACTOR
Employer

**OC: 02/11/07 R: 04
Claimant: Respondent (2)**

Section 96.5(2)a – Discharge
Section 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer, Frank Baxter General Contractor (Baxter), filed an appeal from a decision dated March 7, 2007, reference 01. The decision allowed benefits to the claimant, Jared Cullen. After due notice was issued, a hearing was held by telephone conference call on March 28, 2007. The claimant provided a telephone number of (319) 372-7910. That number was dialed, and the phone rang, but no one answered and the claimant did not participate. The employer participated by President Tony Baxter and Office Manager Dawn Whitmore. Exhibit One was admitted into the record.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Jared Cullen was employed by Baxter from March 29, 2006 until February 1, 2007, as a full-time laborer. He had a history of being no-call/no-show to work and missed seven days between October 2 and December 4, 2006.

On December 20, 2006, there was a meeting of all the personnel on the jobsite where the claimant worked. All employees were notified there had been a problem with absenteeism and failure to call in at that location, and the claimant and three others were named specifically. Everyone was advised the reporting policies would be strictly enforced from that point onward. An employee who is going to be absent must contact the job superintendent on his cell phone, leave a voicemail message or call the main office. The claimant had been issued a cell phone for his own use by the company.

On December 22, 2006, Mr. Cullen was no-call/no-show to work. President Tony Baxter attempted to call him on his company cell phone but there was no answer. He saw him personally at the main office on December 26, 2006, and advised the claimant that his failure to

come to work on call in on December 22, 2006, counted against him and his job was in jeopardy if there were any further incidents.

The claimant was absent on January 19 and 22, 2007, but had a doctor's excuse to cover those days. But he was again no-call/no-show on January 30, 2007. The matter was referred to Mr. Baxter and he notified the claimant on February 1, 2007, he was fired.

Jared Cullen has received unemployment benefits since filing a claim with an effective date of February 11, 2007.

The record was closed at 10:31 a.m. After the record was closed the claimant called the Appeals Section and requested to participate. He had called the Appeals Section on March 20, 2007, to provide his telephone number and had been told if the judge did not call him by 10:05 a.m. the day of the hearing, to call back and have his control number available. He did not call the Appeals Section but instead contacted his local Workforce Center. He finally contacted the Appeals Section after the record had been closed. He acknowledged his phone had had "problems" in the past but did not make arrangements to provide a phone number to a more reliable connection.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

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.

The claimant had been advised his job was in jeopardy as a result of his absenteeism and failure to properly notify the employer of the absences. Whatever the reason for the absence, even if it was due to illness, it is still unexcused if it is not properly reported. All the crew had been notified the policy would be strictly enforced beginning December 20, 2006, and he was personally warned by Mr. Baxter that his attendance was unacceptable about a week later. Under the provisions of the above Administrative Code section, excessive unexcused absenteeism is misconduct for which the claimant is disqualified.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The claimant has received unemployment benefits to which he is not entitled. These must be recovered in accordance with the provisions of Iowa law.

The next issue is whether the record should be reopened. The judge concludes it should not.

871 IAC 26.14(7) provides:

(7) If a party has not responded to a notice of telephone hearing by providing the appeals section with the names and telephone numbers of its witnesses by the scheduled time of the hearing, the presiding officer may proceed with the hearing.

a. If an absent party responds to the hearing notice while the hearing is in progress, the presiding officer shall pause to admit the party, summarize the hearing to that point, administer the oath, and resume the hearing.

b. If a party responds to the notice of hearing after the record has been closed and any party which has participated is no longer on the telephone line, the presiding officer shall not take the evidence of the late party. Instead, the presiding officer shall inquire as to

why the party was late in responding to the notice of hearing. For good cause shown, the presiding officer shall reopen the record and cause further notice of hearing to be issued to all parties of record. The record shall not be reopened if the presiding officer does not find good cause for the party's late response to the notice of hearing.

c. Failure to read or follow the instructions on the notice of hearing shall not constitute good cause for reopening the record.

The claimant received the notice of the hearing and properly followed the instructions and provided a telephone number where he could be contacted, even though he knew the phone was not reliable. He was given instructions not to wait more than five minutes after the scheduled start time if the judge had not called before calling back to the Appeals Section. He did not do this, he called his local Workforce Center, even though the toll-free number for Appeals is on the notice of the hearing. The claimant did not establish good cause to reopen the hearing. Therefore, the his request to reopen the hearing is denied.

DECISION:

The representative's decision of March 7, 2007, reference 01, is reversed. Jared Cullen is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount, provided he is otherwise eligible. He is overpaid in the amount of \$1,132.00.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/css