

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JONES, TROY, F
Claimant

APPEAL NO. 13A-UI-04829-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

AMERICAN BLUE RIBBON HOLDINGS LLC
Employer

OC: 08/05/12
Claimant: Respondent (2-R)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the April 10, 2013, reference 03, decision that allowed benefits. After due notice was issued, a hearing was held on May 28, 2013. Claimant Troy Jones did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Amelia Gallagher of Equifax Workforce Solutions represented the employer and presented testimony through Jean Montgomery. Exhibits Four, Five, and Six were received into evidence.

ISSUE:

Whether Mr. Jones' March 2013 separation from the employer disqualifies him for unemployment insurance benefits or relieves the employer of liability for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Troy Jones was employed by American Blue Ribbon Holdings, L.L.C., d/b/a Village Inn, as a server during two distinct periods. The first period was from August to November 2012. The second period of employment began on January 23, 2013 and ended on March 23, 2013, when Jean Montgomery, General Manager, discharged him for attendance. On March 21, 2013 Mr. Jones notified the employer that he was running late, but that he would report for work. Mr. Jones then did not appear for work. Mr. Jones did not notify the employer he was not going to appear for any part of the shift. The employer's written attendance policy required that Mr. Jones notify the employer at least four hours prior to the scheduled start of his shift if he needed to be absent. That policy was set forth in the employee handbook that was provided to Mr. Jones at the start of the most recent period of employment. On March 22, 2013, Mr. Jones was absent from a scheduled shift and did not notify the employer he would be absent.

After Mr. Jones was absent for two consecutive shifts, the employer replaced Mr. Jones on the work schedule. Mr. Jones would otherwise have been scheduled to work on March 23, 2013. On March 23, 2013, Mr. Jones appeared at the workplace. Ms. Montgomery told Mr. Jones that

he had been replaced and that the employer did not need him. Mr. Jones asserted that he had been unaware that he was scheduled to work on March 22. However, the schedule that included shifts for Mr. Jones on March 21 and 22 had been posted in the usual place in the workplace since March 13.

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 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).

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 evidence in the record establishes two consecutive unexcused absences at the end of a two-month employment. The first was the proposed late arrival without proper notice to the employer followed by the full-shift absence on March 21, 2013 without proper notice to the employer. The second was the no-call no-show absence on March 22, 2013. Mr. Jones' unexcused absences were excessive and constituted misconduct in connection with the employment.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Jones was discharged for misconduct. Accordingly, Mr. Jones is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Jones.

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of the amount of the overpayment and whether the claimant will have to repay the overpaid benefits.

DECISION:

The Agency representative's April 10, 2013, reference 03, decision is reversed. The claimant was discharged on March 23, 2013 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account will not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs