

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JASON C HANEY**

Claimant

**APPEAL NO: 09A-UI-05774-DT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**JACOBSON INDUSTRIAL SERVICES**

Employer

**OC: 03/08/09**

**Claimant: Respondent (1/R)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

Jacobson Industrial Services (employer)) appealed a representative's April 10, 2009 decision (reference 03) that concluded Jason C. Haney (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on May 11, 2009. The claimant received the hearing notice and responded by calling the Appeals Section on April 17, 2009. He indicated that he would be available at the scheduled time for the hearing at a specified telephone number. However, when the administrative law judge called that number at the scheduled time for the hearing, the claimant was not available; therefore, the claimant did not participate in the hearing. The person who answered the claimant's phone indicated he had become incarcerated on or about April 20, and would not be released until sometime in June. The administrative law judge determined to proceed with the hearing, as the claimant had not made contact with the Appeals Section to request a postponement. Elizabeth Jerome appeared on the employer's behalf. Based on the evidence, the arguments of the employer, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUE:**

Was the claimant discharged for work-connected misconduct?

**FINDINGS OF FACT:**

The employer is a temporary employment firm. The claimant's first and to date only assignment through the employer began on April 27, 2008. He worked full time as a laborer at the employer's tire company business client on the first shift. His last day on the assignment was February 23, 2009. The assignment ended because he was discharged due to excessive absenteeism.

The business client has a six-point attendance policy. The claimant had missed four days with no reason given and received one point each day for June 16, July 25, August 12, and September 9. He was 20 minutes tardy on two days with no reason given and was given another half-point each day for August 13 and September 24. As a result, he was given a first

written warning on August 13 advising him he was at 3.5 points, and on September 24 he was given a final warning and suspension advising him he was at 5.0 points.

The final occurrence was on February 24, 2009, when the claimant called in and reported he was going to be absent due to illness. The employer assessed one point for this absence, thereby bringing the claimant to six points, resulting in his discharge.

### **REASONING AND CONCLUSIONS OF LAW:**

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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. 871 IAC 24.32(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

Absenteeism can constitute misconduct; however, to be misconduct, absences must be both excessive and unexcused. 871 IAC 24.32(7). The claimant's prior absences and tardies had been excessive and unexcused. However, in order to establish work-connected misconduct, there must be a current act of misconduct. 871 IAC 24.32(8); Greene v. Employment Appeal Board, 426 N.W.2d 659 (Iowa App. 1988). A determination as to whether an absence is excused or unexcused and therefore misconduct does not rest solely on the interpretation or application of the employer's attendance policy. An absence due to properly reported illness cannot constitute work-connected misconduct since it is not volitional, even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the absence under its attendance policy. 871 IAC 24.32(7); Cosper, supra; Gaborit v. Employment Appeal Board, 734 N.W.2d 554 (Iowa App. 2007). Because the final absence was related to properly reported illness or other reasonable grounds, no final and current incident of unexcused absenteeism occurred which establishes work-connected misconduct and no disqualification is imposed. The employer has failed to meet its burden to establish misconduct.

Cosper, supra. The claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

An issue as to whether the claimant is able and available for work arose as a result of the hearing. This issue was not included in the notice of hearing for this case, and the case will be remanded for an investigation and preliminary determination on that issue. 871 IAC 26.14(5).

**DECISION:**

The representative's April 10, 2009 decision (reference 03) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible. The matter is remanded to the Claims Section for investigation and determination of the able and available issue.

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Lynette A. F. Donner  
Administrative Law Judge

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Decision Dated and Mailed

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