

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DANIEL R BOUSMAN
Claimant

APPEAL NO. 10A-UI-05253-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

BE & K CONSTRUCTION COMPANY
Employer

**Original Claim: 03/07/10
Claimant: Respondent (2-R)**

Section 96.5-2-a – Discharge for Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism
871 IAC 24.32(8) – Current Act
Section 96.3-7 – Recovery of Overpayment

STATEMENT OF THE CASE:

The employer appealed a department representative's decision dated March 30, 2010, reference 01, that held the claimant was not discharged for misconduct on March 5, 2010, and that allowed benefits. A telephone hearing was scheduled for and held on May 20, 2010. The claimant's uncle, David Comstock, participated. Cheryl Clark, Office Manager, participated for the employer. Employer Exhibit 1 was received as evidence for the record.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered the evidence in the record, finds that: The claimant worked as a full-time scaffold builder from April 16, 2007 to March 5, 2010. The claimant received the employer's attendance policy, which provides for progressive discipline due to policy violations. The policy defines excused versus unexcused absences. The policy requires an employee submit an absence request form with 48-hour notice for the planned absence.

The claimant received seven verbal counseling/written warnings for attendance policy violations from November 13, 2009 to February 5, 2010. With the most recent warning, the employer notified the claimant he was suspended on February 10 and that any further absenteeism would lead to termination.

The claimant was scheduled to report to work at 7:30 a.m. on March 9, 2010. The claimant reported to work late at 11:26 a.m., and he left at 11:30 a.m. for court. The claimant did not call in to work prior to being late, nor did he seek an excused absence to go to court with 48 hours' notice.

The claimant is incarcerated in the Clinton County jail for violation of a no contact order, and he authorized his uncle, David Comstock, to participate. The claimant has received unemployment benefits on his current claim.

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(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.

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 administrative law judge concludes that the employer established misconduct in the discharge of the claimant on March 10, 2010, for excessive "unexcused" absenteeism.

The employer established the claimant was repeatedly warned for unexcused absences and other violations of the employer's attendance policy to the point of suspension with a termination warning on February 5, 2010. The claimant incurred an unexcused absence/tardy on March 9, which is a current act of misconduct and constitutes job disqualifying misconduct in light of the progressive discipline.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

Since the claimant has received benefits on his current claim, the overpayment issue is remanded to claims for determination.

DECISION:

The representative's decision dated March 30, 2010, reference 01, is reversed. The claimant was discharged for misconduct in connection with employment on March 10, 2010. Benefits are denied until the claimant requalifies by working in and being paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The overpayment issue is remanded.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/kjw