

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**RAMON HERNANDEZ NUNEZ**  
Claimant

**APPEAL NO. 13A-UI-12567-VST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**JENSEN BUILDERS LTD**  
Employer

**OC: 09/29/13  
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge for Misconduct.

**STATEMENT OF THE CASE:**

The claimant filed an appeal from a representative's decision dated November 6, 2013, reference 01, which held that the claimant was ineligible for unemployment insurance benefits. After due notice, a hearing was held on December 3, 2013, by telephone conference call. The claimant participated personally. The employer participated by Tom Nelson, director of human resources. The record consists of the testimony of Tom Nelson and the testimony of Ramon Nunez. Ike Rocha served as Spanish interpreter.

**ISSUE:**

Whether the claimant was discharged for misconduct.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a construction company. The claimant was hired on May 2, 2013, as a full-time concrete finisher. The claimant's last day of work was October 3, 2013. He was terminated on October 4, 2013, for insubordination.

The incident that led to the claimant's termination occurred on October 3, 2013. The parties disagree on what happened that day. The employer believed that the claimant was working on another site than the one to which he had been assigned. He had been given a warning on September 26, 2013, that he needed to take instructions more seriously and finish the job he was told to do. The claimant does not recall being given a warning and was not told why he was being terminated. The decision to terminate the claimant was made by the general superintendent. The general superintendent did not testify at the hearing.

## 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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Insubordination, which is the continued failure to follow reasonable instructions, constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). The employer has the burden of proof to show misconduct.

The claimant is eligible for unemployment insurance benefits. The administrative law judge concludes that there is insufficient evidence in this record to find that the claimant was insubordinate on October 3, 2013. The employer's evidence did not come from a witness or witnesses who were personally present at the job site where the claimant was working. The claimant testified under oath that he was doing the job that he had been assigned to do. The claimant also denied that he had received a warning on September 26, 2013. The employer did not provide a copy of the warning, which would have been evidence that would have corroborated Mr. Nelson's testimony. Mr. Nelson's testimony was hearsay and while hearsay is admissible in administrative hearings, in and of itself it cannot prove misconduct.

Findings must be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs. Iowa Code Sec. 17A.14(1). Allegations of misconduct 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).

Since the employer did not produce direct evidence of misconduct, the employer has not met its burden of proof to show misconduct. Benefits are allowed if the claimant is otherwise eligible.

**DECISION:**

The decision of the representative dated November 6, 2013, reference 01, is reversed. Unemployment insurance benefits are allowed if the claimant is otherwise eligible.

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Vicki L. Seeck  
Administrative Law Judge

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Decision Dated and Mailed

vls/pjs