

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**ROBERT A FERGUSON**  
Claimant

**APPEAL NO. 12A-UI-03606-S2T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**JACOBSON STAFFING COMPANY**  
Employer

**OC: 12/11/11  
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Jacobson Staffing Company (employer) appealed a representative's March 28, 2012 decision (reference 02) that concluded Robert Ferguson (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for April 24, 2012. The claimant participated personally. The employer participated by Frank Tursi, senior operations manager. The employer offered and Exhibit One was received into evidence.

**ISSUE:**

The issue is whether the claimant was separated from employment for any disqualifying reason.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was hired on November 9, 2009, as a full-time temporary warehouseman. The claimant signed for receipt of the employer's handbook on February 19, 2010. The employer issued the claimant warnings for absenteeism on March 23, and August 3, 2010, and April 6, July 1, and September 29, 2011. The employer notified the claimant that further infractions could result in termination from employment. The claimant had no further absences until February 16, 2012, when his uncle passed away. He properly reported his absence. The employer's bereavement attendance policy does not cover the deaths of extended family members. The employer terminated the claimant on February 17, 2012.

**REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was not discharged for misconduct.

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(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.

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.

The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness, and an incident of tardiness is a limited absence. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not misconduct unless unexcused. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The employer must establish not only misconduct, but that there was a final incident of misconduct that precipitated the discharge. The last incident of absence was a properly reported death in the claimant's extended family that occurred on February 16, 2012. The claimant's absence does not amount to job misconduct because it was properly reported and was not willful or deliberate. The employer has failed to provide any evidence of willful and deliberate misconduct that would be a final incident leading to the discharge. The claimant was discharged but there was no misconduct.

**DECISION:**

The representative's March 28, 2012 decision (reference 02) is affirmed. The employer has not met its burden of proof to establish job-related misconduct. Benefits are allowed.

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Beth A. Scheetz  
Administrative Law Judge

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Decision Dated and Mailed

bas/kjw