

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JESSE COADY**  
Claimant

**APPEAL NO. 08O-UI-07274-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**DES STAFFING SERVICES INC**  
Employer

**OC: 04/20/08 R: 02**  
**Claimant: Respondent (4)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct  
Iowa Code Section 96.5(3)(a) – Refusal of Suitable Work  
Iowa Code Section 96.3(7) – Recovery of Overpayment

**STATEMENT OF THE CASE:**

This matter was before the administrative law judge upon remand by the Employment Appeal Board in Hearing Number 08B-UI-05225. The Employment Appeal Board's decision was based on May 22, 2008, reference 01 decision of the claims representative and the administrative law judge decision entered in Appeal Number 08A-UI-05225-DWT. The purpose of the remand was to address a refusal of suitable work alleged to have occurred after the claimant's April 18, 2008 separation from a prior temporary employment assignment. The Employment Appeal Board had ruled that the April 18, 2008 separation did not disqualify the claimant for unemployment insurance benefits. After due notice was issued on August 13, 2008, a hearing commenced on August 26, 2008. Claimant Jesse Coady participated. Shane Sorenson, Division Manager, represented the employer. Mr. Sorenson's August 26 testimony raised the issue of whether the alleged refusal of suitable work was instead a separation from employment. The April 26 hearing was adjourned because the claimant was unwilling to waive formal notice on the potential separation issues. These included whether the claimant had voluntarily quit without good cause attributable to the employer and whether the claimant had been discharged for misconduct. Prior to adjourning the August 26 proceeding, the administrative law judge notified the parties that new notice would issue to provide the parties with formal notice of the separation issues and that the hearing would be rescheduled so that all relevant issues could be considered and addressed.

On August 27, 2008, the Appeals Section mailed notice of the rescheduled hearing to the parties. On September 9, 2008, the claimant was not available at the telephone number he had provided for the August 26 proceeding. The claimant had not updated his telephone number since the August 26 proceeding. Shane Sorenson, Division Manager, represented the employer. Amy McGregor was also available on behalf of the employer. For both proceedings, the administrative law judge took official notice of the Employment Appeal Board's decision in Hearing Number 08B-UI-05225 and of the Agency's record of benefits issued to the claimant.

On September 10, 2008 at approximately 2:20 p.m., Mr. Coady contacted the Appeals Section, indicated he had missed the September 9 proceeding and requested a return call from the administrative law judge. At 3:58 p.m., the administrative law judge returned Mr. Coady's call.

Mr. Coady indicated that he had received timely notice of the September 9, 2008 proceeding, but had confused his days. Mr. Coady indicated that he was most likely sleeping at the time the administrative law judge attempted to contact him for the hearing. Mr. Coady did not provide good cause to reopen the record. The administrative law judge advised Mr. Coady of his right to appeal the decision.

**ISSUES:**

Whether the claimant refused an offer of suitable employment from the employer after the April 18, 2008 separation from an assignment.

Whether the claimant accepted the new assignment, but then separated from the assignment for a reason that disqualifies him for unemployment insurance benefits.

Whether the claimant was overpaid benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: On April 18, 2008, Jesse Coady separated from a temporary employment assignment Mid-American Recycling, which assignment he had obtained through employment with DES Staffing Services. The separation from the assignment at Mid-American Recycling did not disqualify Mr. Coady for unemployment insurance benefits.

Mr. Coady established a claim for unemployment insurance benefits that was effective April 20, 2008 and received benefits. Workforce Development calculated Mr. Coady's weekly benefit amount to be \$224.00. For the week ending April 26, Mr. Coady reported wages that exceeded his weekly benefit amount and received no benefits. For the period of April 27, 2008 through July 19, 2008, Mr. Coady received benefits totaling \$2,564.00.

On April 25, 2008, Shane Sorenson, DES Staffing Division Manager, telephoned Mr. Coady for the purpose of offering him a new assignment and spoke directly with Mr. Coady. Mr. Sorenson told Mr. Coady that the new assignment would be a full-time, general labor position at RSC Equipment Rental on Northeast Broadway in Des Moines. Mr. Sorenson told Mr. Coady that the hours of the assignment would be 7:00 a.m. to 5:00 p.m., Monday through Friday. Mr. Sorenson told Mr. Coady that the assignment would pay \$10.00 per hour and would start on April 28, 2008. Mr. Coady accepted the work assignment. On April 28, 2008, Mr. Coady did not appear for his first day of work at RSC Equipment Rental or notify the employer that he would be absent from the assignment. On April 29, Mr. Coady again failed to appear for the assignment and did not notify the employer he would be absent from the assignment. When Mr. Coady failed to appear for the assignment a second day, a DES Staffing representative contacted him by telephone. At that time, Mr. Coady told the DES Staffing representative that he had been unable to get himself out of bed. Mr. Coady stated that he was used to working second-shift. At that point, DES Staffing discharged Mr. Coady from the assignment at RSC Equipment Rental and from employment with DES Staffing.

## REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5-3-b provides:

An individual shall be disqualified for benefits:

3. Failure to accept work. If the department finds that an individual has failed, without good cause, either to apply for available, suitable work when directed by the department or to accept suitable work when offered that individual. The department shall, if possible, furnish the individual with the names of employers which are seeking employees. The individual shall apply to and obtain the signatures of the employers designated by the department on forms provided by the department. However, the employers may refuse to sign the forms. The individual's failure to obtain the signatures of designated employers, which have not refused to sign the forms, shall disqualify the individual for benefits until requalified. To requalify for benefits after disqualification under this subsection, the individual shall work in and be paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

b. Notwithstanding any other provision of this chapter, no work shall be deemed suitable and benefits shall not be denied under this chapter to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

(1) If the position offered is vacant due directly to a strike, lockout, or other labor dispute;

(2) If the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;

(3) If as a condition of being employed, the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.

871 IAC 24.24(14)(a)(b) provides:

Failure to accept work and failure to apply for suitable work. Failure to accept work and failure to apply for suitable work shall be removed when the individual shall have worked in (except in back pay awards) and been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

(14) Employment offer from former employer.

a. The claimant shall be disqualified for a refusal of work with a former employer if the work offered is reasonably suitable and comparable and is within the purview of the usual occupation of the claimant. The provisions of Iowa Code section 96.5(3)"b" are controlling in the determination of suitability of work.

b. The employment offer shall not be considered suitable if the claimant had previously quit the former employer and the conditions which caused the claimant to quit are still in existence.

871 IAC 24.24(1)a provides:

(1) Bona fide offer of work.

- a. In deciding whether or not a claimant failed to accept suitable work, or failed to apply for suitable work, it must first be established that a bona fide offer of work was made to the individual by personal contact or that a referral was offered to the claimant by personal contact to an actual job opening and a definite refusal was made by the individual. For purposes of a recall to work, a registered letter shall be deemed to be sufficient as a personal contact.

The evidence in the record indicates that the employer made an offer of suitable employment to Mr. Coady on April 25, 2008. The evidence also indicates that Mr. Coady verbally accepted the offer of suitable employment and agreed to start the assignment on April 28, 2008. Mr. Coady's subsequent conduct was inconsistent with his verbal acceptance of the offer of suitable employment. If the administrative law judge considers only the verbal acceptance of the assignment as evidence of whether there was a refusal of suitable employment, then there was no refusal. However, if the administrative law judge considers Mr. Coady's subsequent conduct as additional evidence of whether there was a refusal of suitable employment, then the weight of the evidence suggests a de facto refusal.

The administrative law judge concludes that this matter is best analyzed as a discharge from the new work assignment for unexcused absences. Mr. Coady had accepted the assignment, was scheduled to appear on April 28 and 29, but failed to appear on either day or alert the employer of his need to be absent. When contacted by the employer Mr. Coady provided a reason for the absences that made the "no-call, no-show" absences unexcused absences under the applicable law. The two consecutive "no-call, no-show" absences at the very start of the new assignment constituted excessive unexcused absences.

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.

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).

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Coady was discharged on April 29, 2008 for excessive unexcused absences that constituted misconduct. Accordingly, Mr. Coady is disqualified for benefits, effective the week ending May 5, 2008, 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. Coady.

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.

Because Mr. Coady has been deemed ineligible for the benefits effective April 27, 2008, the benefits he has received constitute an overpayment. Mr. Coady is overpaid \$2,564.00 and must repay that amount to Workforce Development.

**DECISION:**

This decision is entered based on a limited remand from the Employment Appeal Board. The claimant was discharged from his new assignment and from the employment for misconduct on April 29, 2008. Effective the benefit week that ended May 3, 2008, 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 amount. The employer's account will not be charged. The claimant is overpaid \$2,564.00.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs