

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KEVIN L HEADLEE
Claimant

APPEAL NO. 07A-UI-00626-JTT

**ADMINISTRATIVE LAW JUDGE
AMENDED DECISION**

JENSEN BUILDERS LTD
Employer

**OC: 12/17/06 R: 01
Claimant: Respondent (2)**

Iowa Code section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absences
Iowa Code section 96.3(7) – Recovery of Overpayment

STATEMENT OF THE CASE:

Jensen Builders filed a timely appeal from the January 11, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on February 15, 2007. Claimant Kevin Headlee participated. Mick McBride, Human Resources and Safety Coordinator, represented the employer and presented additional testimony through Nate Galles, Superintendent. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received employer's Exhibits One through Six into evidence.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment, based on excessive unexcused absences, that disqualifies him for unemployment insurance benefits.
Whether the claimant has been overpaid benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Kevin Headlee was employed by Jensen Builders from June 12, 2006 until December 20, 2006, when Nate Galles, Superintendent, discharged him for attendance.

The employer has a written attendance policy that required Mr. Headlee to notify his supervisor at least 30 minutes prior to the scheduled start of his shift if he needed to be absent. Mr. Headlee was aware of the policy. In practice, the employer allowed employees either to notify the shop or to notify their supervisors directly. A foreman was generally at the shop by 5:30 a.m. and was expected to note any calls regarding absences in an Employee Call Log.

The final absence that prompted the discharge occurred on December 20, 2006, when Mr. Headlee was tardy for personal reasons. On December 19, Mr. Headlee had been absent part of the day for personal reasons. As a result of the absence on December 19 and prior attendance and performance issues, foreman Todd Taylor requested that Mr. Headlee be

removed from his work crew. Superintendent Nate Galles directed Mr. Taylor to have Mr. Headlee appear at the employer's shop with his tools at 6:00 a.m. on December 20 so that he could be put to work with another crew. Mr. Taylor forwarded the instructions to Mr. Headlee. Mr. Galles intended to have Mr. Headlee travel to Des Moines with another foreman. Mr. Galles had the foreman wait at the shop until 6:15 a.m. Mr. Galles and the foreman searched for Mr. Headlee inside and outside the shop, but Mr. Headlee was not there. Mr. Galles then went to his office until 6:25 a.m., at which time he returned to the shop and located Mr. Headlee there. Mr. Headlee asserted that he had been at the shop since 6:05 a.m., which Mr. Galles knew was untrue. Mr. Galles then discharged Mr. Headlee from the employment.

On December 18, Mr. Headlee left work early with approval due to illness. Mr. Galles transported Mr. Headlee home. During the ride home, Mr. Galles impressed upon Mr. Headlee the importance of appearing for work on time and notifying the employer at least 30 minutes before a shift if he needed to be absent.

Mr. Headlee's prior absences were as follows. On December 13, Mr. Headlee was absent and failed to properly notify the employer. On November 3, Mr. Headlee was absent two hours because he needed to consult with a bankruptcy attorney. Mr. Headlee had requested the time off in advance and the request had been approved by his supervisor. On November 7, Mr. Headlee was absent and failed to notify the employer. On August 19, Mr. Headlee was absent and did not notify the employer. On August 24, Mr. Headlee was absent part of the day for personal reasons, and on August 25, Mr. Headlee was absent the full day for personal reasons. These two absences were pre-approved. On July 20, Mr. Headlee was absent part of the day due to a dental appointment. Mr. Headlee had requested the time off beforehand and the request had been approved by his supervisor.

Mr. Headlee established a claim for benefits that was effective December 17, 2006 and received benefits totaling \$1,712.00.

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.

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8).

Allegations of misconduct or dishonesty 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).

In order for Mr. Headlee's absences to constitute misconduct that would disqualify him from receiving unemployment insurance benefits, the evidence must establish that Mr. Headlee'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).

The reliability of the testimony or other evidence is an important factor in this case. The employer provided credible firsthand testimony through Superintendent Nate Galles. Where Mr. Galles' firsthand testimony conflicts with Mr. Headlee's testimony, the administrative law judge finds Mr. Galles' testimony more reliable. The employer did not provide testimony from any of the foremen who supervised Mr. Headlee's work, despite having the ability to present such testimony. The employer's system of documenting absences leaves much to be desired. The "job sheets" contained in Exhibit Three provide too little information to be a reliable basis for determining the reason for any particular absence or whether the employer was properly notified of the absence. The evidence indicates that the "Employee Call Logs" contained in

Exhibit Four, and the circumstances under which they were completed, cause these to be an unreliable source for determining the reason for an absence or whether the absence was properly reported to the employer. The call logs were used primarily to document employee calls to the shop. However, the employer made calling the shop only one of the multiple means by which an employee could notify the employer of an absence. Several people shared responsibility for completing the call logs and none but Mr. Galles testified.

The greater weight of the evidence in the record establishes that Mr. Headlee knew he was to be at the shop at 6:00 a.m. on December 20 and was tardy for personal reasons. Accordingly, this absence would be unexcused. The evidence indicates that Mr. Headlee was absent for part of the day on December 19 for personal reasons. The absence was unexcused under the applicable law. Mr. Headlee failed to properly notify the employer with regard to his absence on December 13 and, accordingly, the absence was unexcused under the applicable law. Thus, there were three unexcused absences within an eight-day period. The final two absences occurred immediately following Mr. Galles' discussion with Mr. Headlee on December 18 regarding Mr. Headlee's attendance issues. The administrative law judge finds these unexcused absences within such a short period to be excessive. The three unexcused absences in December followed "no-call, no-show" absences on August 19 and November 7. The administrative law judge finds Mr. Headlee's absences on July 20, August 24, 25, and November 3 to be excused absences because the employer failed to produce sufficient evidence to rebut Mr. Headlee's testimony that he had prior permission to be absent on these days.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Headlee was discharged for misconduct. Accordingly, Mr. Headlee is disqualified for benefits 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. Headlee.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

Because Mr. Headlee has received benefits for which he has been deemed ineligible, those benefits constitute an overpayment that Mr. Headlee must repay to the Agency. Mr. Headlee is overpaid \$1,712.00.

DECISION:

The Agency representative's January 11, 2007, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account will not be charged. The claimant is overpaid \$1,712.00.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs/kjw