

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

JUSTIN L BROWN
1116 KANSAS ST
MUSCATINE IA 52761

MERIT CONSTRUCTION CO
PO BOX 2163
CEDAR RAPIDS IA 52406-2163

Appeal Number: 05A-UI-12104-AT
OC: 10-23-05 R: 04
Claimant: Respondent (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

Merit Constuction Company filed a timely appeal from an unemployment insurance decision dated November 23, 2005, reference 02, which allowed benefits to Justin L. Brown. After due notice was issued, a hearing was held December 28, 2005 with Job Site Superintendent Jim Sellers participating for the employer. Although Mr. Brown had provided a telephone number at which he could be contacted, the number was answered by a recording when called at the time of the hearing. The administrative law judge left instructions for the claimant to call the Unemployment Insurance Appeals Section if he wished to participate. There was no further contact from the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, the administrative law judge finds: Justin L. Brown was employed as a carpenter and laborer by Merit Construction Company from May 31, 2005 until he was discharged June 21, 2005. The final incident leading to discharge occurred on June 21. Mr. Brown was one and one-half hours late. He had not contacted the employer in advance. He was also tardy on June 6 and on one other occasion between June 14 and June 21. Mr. Brown was also absent on June 13 and 14. He did not contact the employer each as required but returned with a doctor's slip. He was given a warning instead of being discharged.

In addition to attendance problems, Mr. Brown did not always follow instructions given to him by Job Site Superintendent Jim Sellers or by the foremen. Mr. Sellers is not certain if Mr. Brown comprehended the instructions. Mr. Brown has received unemployment insurance benefits since filing a claim effective October 23, 2005.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence establishes that the claimant was discharged for misconduct in connection with his employment. It does.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

Excessive unexcused absenteeism, a concept which includes tardiness, is one form of misconduct. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). Absence due to illness is excuse if, and only if, the employee properly reports the absence to the employer. See Higgins and 871 IAC 24.32(7).

The evidence establishes three instances of tardiness in three weeks. It also establishes two days of absence which were not properly reported to the employer. Five instances of unexcused absence in four weeks is sufficient to establish excessive unexcused absenteeism. Benefits must be withheld.

The definition of misconduct set forth above distinguishes between employees who are unable to perform the work to the employer's satisfaction and those who do not work to the best of their ability. While the employer's evidence establishes that Mr. Brown did not perform satisfactorily, it does not establish that the failure was deliberate. The administrative law judge finds no additional misconduct in the evidence of Mr. Brown's unsatisfactory performance. Even so, the evidence relating to attendance is sufficient to result in disqualification.

Mr. Brown has received unemployment insurance benefits to which he is not entitled. They must be recovered in accordance with the provisions of Iowa Code section 96.3-7.

DECISION:

The unemployment insurance decision dated November 23, 2005, reference 02, is reversed. Benefits are withheld until the claimant has worked in and has been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. He has been overpaid by \$808.00.

kjw/kjw