

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MARQUES J BAILEY**  
Claimant

**APPEAL NO. 13A-UI-08285-NT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**SPARBOE FOODS LLC**  
Employer

**OC: 06/02/13**  
**Claimant: Appellant (1)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

Claimant filed a timely appeal from a representative's decision dated June 25, 2013, reference 01, which denied unemployment insurance benefits. After due notice was provided, a telephone hearing was held on August 20, 2013. Claimant participated. Participating as witnesses for the employer were Ms. Lisa Olsen, Warren Miller and Tim Johnson.

**ISSUE:**

The issue in this matter is whether the claimant was discharged for misconduct.

**FINDINGS OF FACT:**

Having considered the evidence in the record, the administrative law judge finds: Marques Bailey was employed by Sparboe Foods, LLC from August 8, 2012 until May 31, 2013 when he was discharged for exceeding the permissible number of attendance infraction points by failing to report for work and not providing proper notification each day as required by company policy.

Mr. Bailey called in late on May 22, 2013 when he determined that the fellow worker who normally provided a ride to work was not going to pick him up. The next working day scheduled for the claimant was May 28, 2013. The claimant called on that day and the follow day, May 29, calling off work due to lack of transportation. The employer received no call from Mr. Bailey on May 30 and May 31 and the claimant did not report for work on those days and discharged when the employer had no further contact with Mr. Bailey.

Employees are subject to discharge if they accumulate six attendance infraction points within a six-month period. Employees are assessed one infraction point for being absent, one-half a point for calling in late and are assessed two points for each absence where they do not call in or report as required by policy. When Mr. Bailey failed to report or provide notification on May 30 or 31, he exceeded the permissible number of attendance infraction points and was discharged after he failed to report or provide notification on May 31. Company employees are expected to call their supervisors to report impending absences.

It is Mr. Bailey's position that although he was unable to report for scheduled work due to lack of transportation and the failure of another worker to provide a ride to him, he did call in on each of his absence days, May 22, May 28, 29, 30 and 31. It is the claimant's position that he spoke to Kelly Johnson on May 30 and spoke to a second shift supervisor who answered the phone on May 31, 2013. It is the claimant's position that he did not report for work the following Monday, June 3, 2013, because he had called Kelly Johnson on that Monday to find out if he still had a job. At that time he was told that he had been terminated.

#### **REASONING AND CONCLUSIONS OF LAW:**

In this matter the evidence establishes that the claimant timely filed an appeal from the representative's decision dated June 25, 2013, reference 01, by facsimile and that the claimant had received a positive fax confirmation that his appeal had been received timely.

The next question before the administrative law judge is whether the evidence in the record establishes that the claimant was discharged under disqualifying conditions. 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.

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.

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. 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).

No aspect of the contract of employment is more basic than the right of the employer to expect that employees will appear for work on the hour and day agreed or that in the alternative they will provide proper, timely notice of their inability to report. Recurrent failure to honor that obligation evinces a substantial disregard for the employer's interests and thus may justify a finding of misconduct in connection with the work.

The claimant in this case was discharged after he had failed to report for scheduled work for five consecutive workdays. The evidence establishes that the claimant called in on May 22, May 28 and May 29 but no calls were received from the claimant on May 30 or 31 although the company monitors when call-ins have been properly made so that the correct attendance points can be assessed for each attendance violation.

Although Mr. Bailey maintains that he did call in on Thursday, May 30 and Friday, May 31, 2013, the employer's records do not reflect a call-in and the administrative law judge notes that Mr. Bailey testified that he did not report for work the following Monday because he had called in to see "if he had a job" and was told that he had been terminated. The administrative law judge concludes that if the claimant had called in each day as represented the claimant would not have concluded that his job was in jeopardy for exceeding the permissible number of attendance infraction points. For this reason the administrative law judge concludes that the testimony of the employer's witnesses that the claimant did not call in as required is more credible and is given more weight.

The Supreme Court in the case of Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984) held that excessive absenteeism and tardiness is a form of job misconduct. The Court held that the absences must be both excessive and unexcused. The administrative law judge concludes that the claimant's failure to report for work for five consecutive workdays was excessive and the claimant's absences were unexcused. The Court in the case of Harlan v. Iowa Department of Job Service, 350 N.W.2d 192 (Iowa 1984) held that absence due to matters of "personal responsibility", e.g. transportation problems are considered to be unexcused.

The employer has sustained its burden of proof in showing that the claimant's discharge took place under disqualifying conditions. Unemployment insurance benefits are withheld.

**DECISION:**

The representative's decision dated June 25, 2013, reference 01, is affirmed. The claimant is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount and is otherwise eligible.

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Terence P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

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