

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JOSEPH S JOHNSON**  
Claimant

**APPEAL NO. 11A-UI-05655-VS**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CREATIVE TILE INC**  
Employer

**OC: 03/06/11**  
**Claimant: Appellant (1)**

Section 96.5-2-a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Employer filed an appeal from a decision of a representative dated April 18, 2011, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on May 26, 2011, in Davenport, Iowa. Claimant participated. Employer participated by Steve Baxter, president. The record consists of the testimony of Steve Baxter; the testimony of Joseph Johnson; and Employer's Exhibit One.

**ISSUE:**

Whether the claimant was discharged for misconduct.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a floor covering business located in Davenport, Iowa. The claimant worked for the employer for five or six years prior to his termination. He was helper/installer. His last day of work was March 1, 2011. He was terminated on March 4, 2011.

The incident that led to the claimant's termination occurred on March 2, 2011. The employer had an out of town job beginning that day. The scheduled time to leave was 8:00 a.m. When the claimant woke up that morning he was in severe back pain. His girlfriend was taking him to the emergency room. The girlfriend called the employer to report that the claimant would not be in to work. The employer required an employee to call prior to the start of the shift if he was unable to come to work. The claimant complied with the policy.

At approximately noon on March 2, 2011, the claimant called his father. His father worked for the employer and the claimant generally worked with his father. The claimant's father told him that he had been terminated. The claimant did not call the employer to report any further absences as he thought he had been terminated.

The claimant had been given a letter of reprimand due to excessive absenteeism on February 18, 2011. (Exhibit 1)

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

Iowa Code § 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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Excessive unexcused absenteeism is one form of misconduct. See *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984).

The concept includes tardiness and leaving early. Absence due to matters of personal responsibility, such transportation problems and oversleeping, is considered unexcused. See *Harlan v. IDJS*, 350 N.W.2d 192 (Iowa 1984) Absence due to illness and other excusable reasons is deemed excused if the employee properly notifies the employer. See *Higgins*, supra, and 871 IAC 24.32(7). In order to justify disqualification, the evidence must establish that the

final incident leading to the decision to discharge was a current act of misconduct. See 871 IAC 24.32(8). See also *Greene v. EAB*, 426 N.W.2d 659 (Iowa App. 1988). The employer has the burden of proof to show misconduct.

The evidence in this case established excessive absenteeism. Before an individual can be disqualified from receiving unemployment insurance benefits, the evidence must also show that the absences were unexcused. Absence due to personal illness is considered excused if the employee properly notifies the employer. The claimant's final absence on March 2, 2011, was due to personal illness. He was in the emergency room with back pain from a non-work-related condition. His girlfriend did notify the employer that he would not be coming to work on March 2, 2011, prior to the start of the shift.

The claimant testified that he did not call in on March 2, 2011, and March 3, 2011. He had spoken with his father, who also worked for the employer, and his father told him on March 2, 2011, that he had been terminated. The claimant could reasonably believe that since he had been terminated, there was no need to call in. Since the claimant was terminated for an absence on March 2, 2011, that was due to personal illness and properly reported, there is no current act of misconduct. Benefits are allowed if the claimant is otherwise eligible.

**DECISION:**

The decision of the representative dated April 18, 2011, reference 01, is affirmed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

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Vicki L. Seeck  
Administrative Law Judge

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Decision Dated and Mailed

vls/pjs