

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**RAYMOND D BRINK**  
Claimant

**APPEAL NO. 09A-UI-04334-CT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**A B C O ENGINEERING CORP**  
Employer

**OC: 11/30/08**  
**Claimant: Respondent (1)**

Section 96.5(2)a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

ABCO Engineering Corporation filed an appeal from a representative's decision dated January 7, 2009, reference 01, which held that no disqualification would be imposed regarding Raymond Brink's separation from employment. After due notice was issued, a hearing was held by telephone on February 16, 2009. The February 17, 2009 decision of the administrative law judge affirmed the allowance of benefits. The employer filed a further appeal with the Employment Appeal Board which, on March 18, 2009, remanded the matter for a new hearing on a finding that the employer's failure to participate in the prior hearing was due to circumstances beyond its control.

Pursuant to the remand, due notice was issued scheduling a hearing for April 29, 2009. Mr. Brink participated personally. The employer participated by Bob Ruark, President.

**ISSUE:**

At issue in this matter is whether Mr. Brink was separated from employment for any disqualifying reason.

**FINDINGS OF FACT:**

Having heard the testimony of the witnesses and having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Brink began working for ABCO Engineering, Corporation on March 17, 2007. He was employed full time as a welder. He was discharged because of his attendance. He was absent because of an appointment with his lawyer on August 22 and to straighten out his child support issues on August 22, 2008. He was absent on September 17 because the zipper in his pants broke and on September 22 because his sister was in jail. After September 30, he missed a good deal of work due to illness and medical appointments.

Mr. Brink was absent without notice for unknown reasons on October 23. He was absent due to personal business on November 10. He was again absent without notice for unknown reasons on November 25. In October of 2008, Mr. Brink took a part-time job with Dairy Queen. There were dates on which he was absent from work with ABCO but worked at Dairy Queen. Notice of his discharge from ABCO was given to Mr. Brink's girlfriend. His discharge was due to the

fact that he had missed 41 days of work since June 6, 2008 and the fact that he worked elsewhere when absent from his full-time job. According to the employer's information, he continued to call in until December 9, 2008. He was never warned, either verbally or in writing, that his continued employment was in jeopardy.

**REASONING AND CONCLUSIONS OF LAW:**

An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). An individual who was discharged because of attendance is disqualified from benefits if he was excessively absent on an unexcused basis. In order for an absence to be excused, it must be for reasonable cause and must be properly reported. 871 IAC 24.32(7). The administrative law judge is not bound by an employer's designation of an absence as unexcused.

The evidence established that Mr. Brink missed a good deal of time from work. However, it is only the unexcused absences that would affect his entitlement to job insurance benefits. It is true that Mr. Brink had unexcused absences when he failed to report to work with no notice to the employer. However, the employer did not discharge him on those dates. Moreover, the employer never notified Mr. Brink that he was in danger of losing his job because of his attendance. Therefore, he did not know there was something he needed to do differently in order to preserve his employment. It is true that he took a part-time job at Dairy Queen and worked there on occasions when he did not report for work with ABCO. It is conceivable that he might be able to spend a few hours cooking at Dairy Queen but not a full shift working as a welder at ABCO.

Because Mr. Brink was not warned about his attendance, he was not given a full and fair opportunity to conform his attendance to the employer's expectations. In other words, the employer condoned his attendance for such an extended period of time without warnings that he had no reason to believe the employer expected something different. While the employer had good cause for the discharge, conduct that might warrant a discharge from employment will not necessarily support a disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa App. 1983). For the reasons stated herein, benefits are allowed.

**DECISION:**

The representative's decision dated January 7, 2009, reference 01, is hereby affirmed. Mr. Brink was discharged but disqualifying misconduct has not been established. Benefits are allowed, provided he is otherwise eligible.

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Carolyn F. Coleman  
Administrative Law Judge

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Decision Dated and Mailed

cfc/pjs