

**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**

**KENT R JOHNSON
1340 NASH AVE
KANAWHA IA 50447**

**IOWA MOLD TOOLING CO INC
500 HWY 18 W
PO BOX 189
GARNER IA 50438**

**Appeal Number: 05A-UI-11644-JTT
OC: 10/23/05 R: 02
Claimant: Appellant (1)**

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
871 IAC 24.32(7) – Excessive Unexcused Absences

STATEMENT OF THE CASE:

Claimant Kent Johnson filed a timely appeal from the November 4, 2005, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on December 1, 2005. Mr. Johnson participated. Human Resources Manager Rhonda Krause represented the employer. Exhibits One and Two were received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Kent Johnson was employed by Iowa Mold Tooling Company (IMT) as a full-time assembler from February 22, 1999 until October 24, 2005, when Human Resources Manager Rhonda Krause discharged him for excessive unexcused absences.

The final absence that prompted the discharge occurred on October 21, 2005. Mr. Johnson had requested the day off to assist his father on his father's farm. Mr. Johnson's immediate supervisor, Dave Hanson, denied the request. On October 20, 2005, Mr. Johnson left work with the understanding that he would be discharged if he failed to appear for work the following day. On October 21, Mr. Johnson contacted Mr. Hanson to indicate he would be absent. Mr. Hanson advised Mr. Johnson at that time that he was "out of here." Mr. Johnson understood the comment to mean that he was discharged from the employment. Mr. Johnson was next scheduled to work on October 24, 2005. When Mr. Johnson arrived at work, he met with Ms. Krause. Mr. Johnson advised that he was there to collect his tools. Mr. Johnson advised that he had no choice but to help his father and that farming was more important than his employment with IMT. Based on Mr. Hanson's conversation with Mr. Johnson on October 20, Ms. Krause did not feel the need to reiterate that Mr. Johnson was discharged from the employment when she spoke with him on October 24.

The employer has a written attendance policy set forth in an employee handbook. Mr. Johnson received a copy of the handbook on his date of hire. Pursuant to the attendance policy, Mr. Johnson was required to notify his supervisor within one hour of the start time of his shift if he needed to be absent. Under the employer's attendance policy, the employer considers any absences not previously approved by the employer or not involving a doctor's appointment or an emergency to be unexcused absences. Thus, if an employee calls in sick, the employer records the absence as an unexcused absence, but may not record that the reason for the absence was illness.

Mr. Johnson's prior absences for 2005 were as follows. Mr. Johnson was tardy on February 26 and October 6. On May 25 and September 9, Mr. Johnson was absent, properly reported the absence, and the employer recorded the absence as unexcused. The employer was unable to provide additional information regarding these two absences. On June 27 and 28, Mr. Johnson was absent due to illness properly reported to the employer. On September 29, Mr. Johnson was absent during the afternoon because he thought work had been called off for the afternoon.

On October 11, 2005, Supervisor Dave Hanson issued a written warning to Mr. Johnson that his "total attendance points" were reduced to four and that if the attendance points reached one Mr. Hanson would be subject to discharge.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is not whether the employer was justified in discharging Mr. Johnson. Rather, the question is whether the evidence in the record establishes that Mr. Johnson was discharged for misconduct based on excessive unexcused absences. It is the applicable Iowa law, not the employer's attendance policy, that defines "unexcused absence" for purposes of determining Mr. Johnson's eligibility for benefits.

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(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.

Because the claimant was discharged, the employer bears 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). 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. Johnson's absences to constitute misconduct that would disqualify him from receiving unemployment insurance benefits, the evidence must establish that Mr. Johnson'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 evidence in the record establishes that Mr. Johnson's absence on October 21, 2005, was unexcused. In addition, the employer has proved unexcused absences on February 26, September 29, and October 6. On the other hand, the employer has not proven, by a preponderance of the evidence, that the absences on May 25 and September 9 were unexcused. The employer had the ability to provide more direct and satisfactory evidence of these absences through the testimony of Supervisor Dave Hanson, but elected not to offer such testimony. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976). See also 871 IAC 24.32(4).

The evidence in the record indicates that between September 29 and October 21, Mr. Johnson left work midway through a shift without permission, was tardy to work on one occasion, received a written reprimand that warned him he was close to being discharged from the employment, and then was absent again. The final absence that prompted the discharge was in open defiance of the employer's instructions. Based on the evidence in the record and

application of the appropriate law, the administrative law judge concludes that Mr. Johnson's unexcused absences were, in fact, excessive. Accordingly, Mr. Johnson 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. Johnson.

DECISION:

The Agency representative's decision dated November 4, 2005, reference 01, is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements.

jt/tjc