

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JOSHUA C VISEK
Claimant

EXPRESS SERVICES INC
Employer

APPEAL 19A-UI-08904-AD-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 10/06/19
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

On November 12, 2019, Express Services Inc. (employer) filed an appeal from the November 5, 2019 (reference 01) unemployment insurance decision that determined Joshua Visek (claimant) was eligible to receive unemployment insurance benefits. Specifically, it was determined that claimant did not voluntarily quit but was discharged for reasons not constituting willful or deliberate misconduct.

A telephone hearing was held on December 5, 2019. The parties were properly notified of the hearing. Employer participated by Administrative Recruiter Leann McKeown. Claimant did not register a telephone number with the appeals bureau at which he could be reached prior to the hearing and did not participate.

Administrative notice was taken of claimant's payment history on the unemployment insurance system. Administrative notice was taken of two fact-finding documents: a statement from employer to the department dated October 24, 2019, and a handbook receipt signed by claimant.

ISSUE(S):

- I. Was the separation a layoff, discharge for misconduct, or voluntary quit without good cause?
- II. Was the claimant overpaid benefits? Should claimant repay benefits and/or charge employer due to employer participation in fact finding?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

Claimant began working for employer on April 30, 2019. He started an assignment on that date. The assignment ended on October 4, 2019, due to a lack of work. He spoke with employer at that

time about other assignments but declined to take them. Claimant was separated from employer on October 9, 2019.

McKeown testified that employer considered claimant to have quit on October 9, 2019, as he had not accepted offered assignments or called in for assignments. However, claimant did not tell anyone he was quitting. McKeown stated employer also assumes employees have found work on their own if employer does not hear from them for a while.

Employer has a policy that states in part, "I must call Express within 48 hours of the end of an assignment...to ensure my active status as an Express Associate, and continue to call weekly...to remain eligible for assignments. I further understand that failure to report the end of an assignment...will be considered job abandonment." Claimant acknowledged receiving this policy on April 29, 2019.

REASONING AND CONCLUSIONS OF LAW:

For the reasons set forth below, the November 5, 2019 (reference 1) unemployment insurance decision that determined claimant was eligible to receive unemployment benefits is AFFIRMED. Claimant did not voluntarily quit employment and was discharged for reasons that do not constitute job-related misconduct.

- I. Was the separation a layoff, discharge for misconduct, or voluntary quit without good cause?

The administrative law judge finds claimant did not voluntarily quit on October 9, 2019. He did not fail to report and so did not abandon his job, nor did he explicitly quit. The administrative law judge notes employer's job abandonment policy is not in compliance with Iowa law and thus, even if claimant had failed to report within 48 hours, he would not have been deemed to have voluntarily quit. See Iowa Code Section 96.5(1)j.

The administrative law judge instead finds claimant's separation on October 9, 2019 was a discharge by employer. It is therefore necessary to analyze whether claimant's discharge was for job-related misconduct.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32 provides in relevant part:

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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer bears the burden of proving that a claimant is disqualified from receiving benefits because of substantial misconduct within the meaning of Iowa Code section 96.5(2). *Myers v. Emp't Appeal Bd.*, 462 N.W.2d 734, 737 (Iowa Ct. App. 1990). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The focus is on deliberate, intentional, or culpable acts by the employee. When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman, Id.* In contrast, 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. *Newman, Id.*

When reviewing an alleged act of misconduct, the finder of fact may consider past acts of misconduct to determine the magnitude of the current act. *Kelly v. Iowa Dep't of Job Serv.*, 386 N.W.2d 552, 554 (Iowa Ct. App. 1986). However, conduct asserted to be disqualifying misconduct must be both specific and current. *West v. Emp't Appeal Bd.*, 489 N.W.2d 731 (Iowa 1992); *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988).

Because our unemployment compensation law is designed to protect workers from financial hardships when they become unemployed through no fault of their own, we construe the provisions "liberally to carry out its humane and beneficial purpose." *Bridgestone/Firestone, Inc. v. Emp't Appeal Bd.*, 570 N.W.2d 85, 96 (Iowa 1997). "[C]ode provisions which operate to work a forfeiture of benefits are strongly construed in favor of the claimant." *Diggs v. Emp't Appeal Bd.*, 478 N.W.2d 432, 434 (Iowa Ct. App. 1991).

Employer has not carried its burden of proving claimant is disqualified from receiving benefits because of a current act of substantial misconduct within the meaning of Iowa Code section 96.5(2). The separation was based on claimant's failure to accept offered assignments. However, there is no evidence that he was under any obligation to accept offered assignments.

II. Was the claimant overpaid benefits? Should claimant repay benefits and/or charge employer due to employer participation in fact finding?

Because the administrative law judge affirms the department's decision that claimant is eligible to receive benefits, it is not necessary to address these issues.

DECISION:

The November 5, 2019 (reference 01) unemployment insurance decision that determined claimant was eligible to receive unemployment benefits is AFFIRMED. Claimant did not voluntarily quit employment and was discharged for reasons that do not constitute job-related misconduct. He is thus not disqualified from receiving benefits, so long as he is otherwise eligible.

Andrew B. Duffelmeyer
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Decision Dated and Mailed

abd/scn