IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ANTHONY D HARRIS
Claimant

EXPRESS SERVICES INC
Employer

APPEAL NO. 12A-UI-04302-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/18/12
Claimant: Appellant (1)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Anthony Harris filed a timely appeal from the April 9, 2012, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on May 8, 2011. Mr. Harris participated. Brandy Whittenbaugh represented the employer. Exhibits One and Two were received into evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The employer is a temporary employment agency. Anthony Harris was employed by Express Services until March 1, 2012, when Express Services discharged him from his employment. Mr. Harris started a full-time, temp-to-hire assignment at Kline Tools in April 2011. On February 29, 2012, Kline Tools discharged Mr. Harris from the assignment after he referred to a co-worker as trash when speaking to another co-worker. The co-worker Mr. Harris was referring to in his statement was present for the comment, as were other co-workers. One of the other co-workers reported the incident to Kline Tools management. This incident followed another similar incident in October 2011, wherein Mr. Harris refused to take suggestions from Ms. Bennett because, in his words, “You can’t handle your own fat ass.” Express Services had issued a written reprimand after the October incident and had warned Mr. Harris that he would be discharged if the conduct continued.

REASONING AND CONCLUSIONS OF LAW:

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.

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. 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).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8).

An employer has the right to expect decency and civility from its employees and an employee's use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct disqualifying the employee from receipt of unemployment insurance benefits. Henecke v. Iowa Department of Job Service, 533 N.W.2d 573 (Iowa App. 1995). Use of foul language can alone be a sufficient ground for a misconduct disqualification for unemployment benefits. Warrell v. Iowa Dept. of Job Service, 356 N.W.2d 587 (Iowa Ct. App. 1984).

Despite the lack of testimony from persons with firsthand knowledge, there is sufficient evidence in the record to establish by a preponderance that Mr. Harris did indeed direct derogatory language toward Ms. Bennett on or about February 28, 2012. While Mr. Harris stopped short of admitting the conduct, he placed himself at the scene uttering a comment about trash. Mr. Harris' attempt to explain away the comment was creative, but not plausible or credible. The conduct was at least the second time Mr. Harris had directed patently offensive comments at the co-worker and occurred after he had been warned that such conduct would lead to his discharge.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Harris was discharged for misconduct. Accordingly, Mr. Harris 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. Harris.

DECISION:

The Agency representative's April 9, 2012, reference 01, decision 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. The employer's account will not be charged.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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