

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JAMES P DAVIS
Claimant

APPEAL NO. 10A-UI-05155-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

EXPRESS SERVICES INC
Employer

OC: 02/22/09
Claimant: Respondent (2-R)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 26, 2010, reference 02, decision that allowed benefits. After due notice was issued, a hearing was held on May 18, 2010. Claimant James Davis did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Erin Rohwer, Staffing Consultant, represented the employer. Exhibit One was received into evidence.

ISSUE:

Whether Mr. Davis separated from his temporary employment work assignment for a reason that disqualifies him for unemployment insurance benefits.

Whether Mr. Davis separated from the temporary employment agency for a reason that disqualifies him 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. James Davis was employed by Express Services from October 2009 until January 11, 2010. Mr. Davis performed work in one temporary employment work assignment at Helen Industries. On January 11, 2010, Helen Industries notified Express Services that it was ending Mr. Davis's assignment due to attendance. Under the Express Services and Helen Industries attendance policies, Mr. Davis was required to notify both companies prior to the scheduled start of his shift if he needed to be absent. The employer, Express Services, reviewed its policy with Mr. Davis at the start of his employment. The client business, Helen Industries, reviewed its policy with Mr. Davis at the start of the assignment. Mr. Davis was absent from the assignment on December 29 and 30 and January 7 and 8. For each absence, Mr. Davis contacted the absence reporting line at Helen Industries prior to the scheduled start of his shift and had left a voicemail message indicating he would be absent, but did not provide a reason for his absence. For each absence, Mr. Davis did not contact Express Services to indicate he would be absent from his assignment.

On January 11, 2010, Erin Rohwer, Staffing Consultant, telephoned Mr. Davis and left a message that the client had ended the assignment. Ms. Rohwer directed Mr. Davis to contact Express Services. Mr. Davis did not make further contact with Express Services.

At the start of his employment, Express Services had Mr. Davis sign two documents dealing with his obligation to contact Express Services within three working days of the end of an assignment. One such document was a tear-out sheet in the employee handbook that contained multiple policies. The second document contained the heading: "End-of-Assignment Reporting Requirements." That document states as follows:

I agree to call my Express Supervisor at the end of each job assignment. If I do not call within (3) working days from the end of an assignment, Express can consider me to have voluntarily quit. To make sure that Express knows I am available for work when I am not on an assignment, I will call in at least once a week to let Express know I am available.

I understand and agree to these terms and conditions.

After Mr. Davis signed the policy, the employer made a copy of the document and provided it to Mr. Davis.

REASONING AND CONCLUSIONS OF LAW:

The administrative law judge will first address Mr. Davis' discharge from the assignment.

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 a discharge 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).

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant'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 weight of the evidence indicates that Mr. Davis was discharged from the assignment after four absences between December 29, 2009 and January 8, 2010. The weight of the evidence indicates that Mr. Davis was absent for personal reasons, not for illness properly reported to the employer. Mr. Davis complied with the client business's absence reporting procedure, but did not comply with his actual employer's absence reporting requirements in connection with any of the absences. Mr. Davis was discharged from the assignment for excessive unexcused absences that amounted to misconduct in connection with the employment. Mr. Davis's discharge from the assignment disqualifies him 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. Davis.

Based on the conclusion that Mr. Davis was discharged from the assignment for misconduct, the administrative law judge need not further consider his separation from the temporary employer. Nonetheless, had Mr. Davis not been discharged from his assignment for misconduct, the weight of the evidence indicates that his separation from the temporary employment agency would have been for good cause attributable to the employer. This is because the employer's end-of-assignment policy statement does not provide the statutorily mandated clear and concise statements of the consequences of failing to notify the employer within three working days of the end of an assignment. See Iowa Code section 96.5(1)(j). Had Mr. Davis completed the assignment and not been discharged for misconduct, any decision on his part at that point not to seek further assignments through Express Services would not have disqualified him for unemployment insurance benefits.

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the

claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The Agency representative's March 26, 2010, reference 02 decision is reversed. The claimant was discharged from his work assignment for misconduct. Effective January 10, 2010, the claimant is disqualified for benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount, provided he is otherwise eligible. The employer's account will not be charged.

This matter is remanded to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs