

**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**

**DARRELL L HASCH
114 – 4TH ST
SHEFFIELD IA 50475**

**EXPRESS SERVICES INC
PO BOX 720660
OKLAHOMA CITY OK 73172-0660**

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**Appeal Number: 04A-UI-09933-RT
OC: 08-08-04 R: 02
Claimant: Respondent (5)**

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
Section 96.5-1 – Voluntary Quitting
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Express Services, Inc., filed a timely appeal from an unemployment insurance decision dated September 8, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Darrell L. Hasch. After due notice was issued, a telephone hearing was held on October 6, 2004, with the claimant participating. The claimant was represented by Ron Wagenaar, Attorney at Law. Andre Smith, Staffing Consultant, participated in the hearing for the employer. Although the employer's witness was supposed to be Connie Kooper, when the administrative law judge called her, she was not there and Mr. Smith participated in the hearing

in her place. When the administrative law judge called Mr. Wagenaar, the claimant had not yet arrived. The administrative law judge began the hearing and the claimant arrived while the administrative law judge was still giving his opening statement and participated in the balance of the hearing, including all of the testimony. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer since October 15, 2003 until he was separated from his employment on August 4, 2004. The employer is a temporary employment agency. The last assignment the claimant had was with Heartland Asphalt, which was a short-term assignment. Because the work was sporadic, the claimant also worked part-time at NIVC when there was no work for Heartland Asphalt. During this period, the claimant was on a restriction placed by his physician of lifting no more than 10 pounds. The employer met his restriction by placing at him at Heartland Asphalt, which job met the claimant's restrictions, as did the job at NIVC. While working for NIVC on August 4, 2004, the claimant went to his physician and the physician released the claimant to return to work without restrictions. The claimant finished out his time at NIVC and then went to the employer's office and informed the employer that he was released to work without restrictions. The employer informed him that it had no work available for him at that time. Then as instructed, the claimant contacted the employer every week on August 9, 16, 23, and 30, 2004 and each time was informed that there was no work available. The claimant satisfactorily completed his assignments to Heartland Asphalt and NIVC and there was no further work available for him with either one of both of those. The employer has a policy in its handbook, a copy of which the claimant received and for which he signed an acknowledgement, providing that an employee must notify the employer within 48 hours or two working days of the completion of an assignment. Pursuant to his claim for unemployment insurance benefits filed effective September 8, 2004, the claimant has received unemployment insurance benefits in the amount of \$1,296.00 as follows: \$162.00 per week for eight weeks from benefit week ending August 14, 2004 to benefit week ending October 2, 2004.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.
2. Whether the claimant is overpaid unemployment insurance benefits. He is not.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Code Section 96.5-1 provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

The first issue to be resolved is the character of the separation. Neither party advocates any particular separation. The administrative law judge concludes that the claimant was effectively laid off for a lack of work on August 4, 2004. The claimant credibly testified that on that day he was working on a light duty assignment with NIVC, which met his physical restrictions that had previously been placed on him. The claimant further credibly testified that he went to see his physician on that day and his physician released the claimant to work without any restrictions. The claimant then completed his assignment at NIVC and went back to the employer and informed it that he was released to return to work without restrictions. At that time the claimant credibly testified he was informed that there was no work available. The claimant then credibly testified that he contacted the employer each week as he was supposed to do per the employer's handbook, on August 9, 16, 23, and 30, 2004. On each occasion the claimant was told that there was no work available. Under these circumstances, the administrative law judge concludes that the claimant was effectively laid off for a lack of work on August 4, 2004 when he reported back to the employer informing the employer that his working restrictions had been released and he was informed that the employer had no available work for him. The claimant has continued to keep in touch with the employer thereafter. Accordingly, the administrative law judge concludes that the claimant was laid off for a lack of work on August 4, 2004. Being laid off for a lack of work is not disqualifying.

Even should the claimant's separation be considered a discharge, the administrative law judge would conclude that there is not a preponderance of the evidence of any acts or omissions on the part of the claimant constituting a material breach of his duties and/or evincing a willful or wanton disregard of the employer's interests and/or in carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. Although the employer's witness, Andre Smith, Staffing Consultant, testified that the claimant did not report to the employer until August 9, 2004, six days after the completion of his assignment, Mr. Smith's testimony was all from hearsay and the claimant's direct credible testimony outweighs that testimony of Mr. Smith. The claimant testified that he contacted the employer immediately after his restrictions were released. Accordingly, the administrative law judge concludes that if the claimant were separated as a result of his discharge, it was not for disqualifying misconduct and he would still not be disqualified to receive unemployment insurance benefits.

Even if the claimant's separation should be considered a voluntary quit, the administrative law judge would again conclude that the claimant is not disqualified. The evidence establishes that the employer was a temporary employment firm. The claimant testified that he was assigned to both Heartland Asphalt and NIVC. The administrative law judge concludes that he satisfactorily completed both assignments. Even Mr. Smith concedes that the claimant satisfactorily completed his assignment with Heartland Asphalt even though Mr. Smith had no record of the claimant's assignment to NIVC. In any event, the claimant was not advised in writing of the duty to notify the temporary employment firm upon the completion of an employment assignment within three working days. The evidence establishes that the employer advised the claimant in writing that he needed to notify the employer within 48 hours or two working days of the completion of an assignment and this does not comply with Iowa Code section 96.5(1)(j) which requires that a claimant be informed of a three-day notice requirement and so notify the employer within three days. Accordingly, the administrative law judge concludes that even if the claimant had failed to notify the employer of the completion of his assignments, it would not be deemed a voluntary quit or at least he would not be disqualified to receive unemployment insurance benefits as a voluntary quit because the employer's policy does not comply with Iowa Code section 96.5(1)(j). Finally, the evidence establishes that both assignments, to Heartland Asphalt and to NIVC, met the claimant's work restrictions, and as soon as his work restrictions were removed by his physician on August 4, 2004, he so informed the employer. The administrative law judge would conclude that the claimant did, in fact, notify the employer within three working days of the completion of his two assignments. It appears to the administrative law judge that he satisfactorily completed both of the assignments.

In summary, the administrative law judge concludes that the claimant was laid off for a lack of work and, as a consequence, he is not disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided he is otherwise eligible.

Iowa Code Section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$1,296.00 since separating from the employer herein on or about August 4, 2004 and filing for such benefits effective August 8, 2004. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

During the hearing some reference was made to whether the claimant was able for work and whether the claimant had refused to accept suitable work. Whether the claimant is ineligible to receive unemployment insurance benefits because he was not able to work or whether the claimant is disqualified to receive unemployment insurance benefits because he refused to accept suitable work were not set out on the notice of appeal sent to the parties and the administrative law judge has no jurisdiction to decide those issues. Because of the evidence at the hearing, the administrative law judge concludes that there is insufficient reason to remand this matter to Claims for an investigation and determination of either of those issues. If the employer believes that the claimant is not able to work or has refused to accept suitable work, the employer can always protest the claimant's benefits at any time for those two reasons.

DECISION:

The representative's decision of September 8, 2004, reference 01, is modified. The claimant, Darrell L. Hasch, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was laid off for a lack of work. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out of his separation with the employer herein.

pjs/kjf