

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**TARJE N WILDER**  
Claimant

**APPEAL NO. 10A-UI-15619-LT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**EXPRESS SERVICES INC**  
Employer

**OC: 10/03/10**  
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

The claimant filed a timely appeal from the November 8, 2010 (reference 02) decision that denied benefits. After due notice was issued, a telephone conference hearing was held on January 7, 2011. Claimant participated. Employer participated through owner Debra Beighley. The administrative law judge took judicial notice of the administrative record.

**ISSUE:**

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of benefits.

**FINDINGS OF FACT:**

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant most recently worked full-time as a long-term laborer at Con-Trol Container Management from May 20, 2010 and was separated from employment on September 29, 2010. He was discharged from the assignment because of attendance issues during the probationary period. He had verbal warnings about attendance and tardiness on July 12, 25, August 10, 15, and August 31 (the employer's documentation indicates September 1), and September 12 related to reported illness. The assignment supervisor told him on September 13 he may not pass his probationary period for permanent hire because of attendance issues. Employer testified about a September 29 absence, which is not referred to in the documentation, but claimant recalls one reported absence due to car problems. After the end of that assignment he had accepted a job with Con Agra Foods on October 26, 2010 but called to report his absence at the assignment because of attending an out-of-town funeral. At that point he was terminated from the assignment and from the employment with Express Services. Claimant recalled calling and leaving messages at both places but the employer has no record of such a call and requires more than one hour notice for excused attendance at a funeral, which is generally scheduled a few days in advance.

## REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

Iowa Code § 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.

The employer has the burden of proof in establishing disqualifying job misconduct and absences due to properly reported illness or injury, even if excessive, cannot constitute job misconduct since they are not volitional and are excused. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness, and an incident of tardiness is a limited absence. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984).

Although the absence related to transportation issues is unexcused, the employer's records were unclear about when it occurred and it was the only unexcused absence during the employment assignment period with Con-Trol. A failure to report to work without notification to the employer is generally considered an unexcused absence. Since the only absence with Con-Agra related to the funeral was not properly reported or requested in advance, it is considered unexcused. However, one unexcused absence in a period of employment is not disqualifying since it does not meet the excessiveness standard. Benefits are allowed.

**DECISION:**

The November 8, 2010 (reference 02) decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible. The benefits withheld shall be paid to claimant.

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Dévon M. Lewis  
Administrative Law Judge

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Decision Dated and Mailed

dml/pjs