

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TABITHA S SMIDT

Claimant

APPEAL NO: 11A-UI-16125-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

EXPRESS SERVICES INC

Employer

OC: 10/30/11

Claimant: Respondent (2/R)

Section 96.5-2-a – Discharge

Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

Express Services, Inc. (employer) appealed a representative's December 8, 2011 decision (reference 01) that concluded Tabitha S. Smidt (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on January 19, 2012. The claimant failed to respond to the hearing notice and provide a telephone number at which she could be reached for the hearing and did not participate in the hearing. Erin Platts appeared on the employer's behalf. Based on the evidence, the arguments of the employer, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

OUTCOME:

Reversed. Benefits denied.

FINDINGS OF FACT:

The employer is a temporary employment firm. The claimant's first and only assignment with the employer began on August 3, 2011. She worked full time on the first shift as a production worker at the employer's business client's business. Her last day of work was October 28, 2011.

On Friday, October 28 the business client contacted the employer and indicated it wished to end the claimant's assignment. The reason for the ending of the assignment was because on that date the claimant had made a comment to a coworker that she "shouldn't be in the country if she can't speak English." The business client had verbally warned the claimant about making a similar comment just the prior week, so when there was another incident on October 28, the business client determined to end the assignment.

After speaking to the business client, the employer's director of operations, Platts, called the claimant on October 28. She left a voice mail message for the claimant that she was not to report back to work at the business client, that the business client had determined to end the assignment, and that if the claimant had any questions, she was to contact Platts. However, the claimant did not contact Platts; rather, on October 31, 2011, the claimant sought to return back to work with the business client. When she was told she was no longer on the assignment, she indicated that she had gotten Platts' message, but wanted to talk to the business client to find out why it had taken her off the assignment. She was then escorted from the business client's facility and told to contact the employer. She still did not contact the employer, but later that day she returned to the business client and again sought to inquire of the business client why she had been released from the assignment; she was again escorted from the facility and told to contact the employer, and was further told that if she returned again, law enforcement would be contacted.

The claimant then did speak with Platts, who explained the business client's reason for ending the assignment; the claimant disputed the claim and indicated she had only asked the coworker to speak to her in English. However, Platts further advised the claimant that her employment with the employer was permanently ended because the claimant had not followed Platts' instructions not to return to the business client but to contact her with any questions.

The claimant established a claim for unemployment insurance benefits effective October 30, 2011. The claimant has received unemployment insurance benefits after the separation.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982); Iowa Code § 96.5-2-a.

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

The claimant's making of the comment to her coworker and her subsequent returning to the business client after having been instructed not to do so shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an

intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. The employer discharged the claimant for reasons amounting to work-connected misconduct.

The unemployment insurance law 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. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code § 96.3-7. In this case, the claimant has received benefits but was ineligible for those benefits. The matter of determining the amount of the overpayment and whether the claimant is eligible for a waiver of overpayment under Iowa Code § 96.3-7-b is remanded the Claims Section.

DECISION:

The representative's December 8, 2011 decision (reference 01) is reversed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of October 30, 2011. This disqualification continues until the claimant has been paid ten times her weekly benefit amount for insured work, provided she is otherwise eligible. The employer's account will not be charged. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/css