

**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**

**MICHAEL R ZAPATA
418 –8TH AVE S APT 3
CLINTON IA 52732**

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

**Appeal Number: 04O-UI-12499-AT
OC: 06-13-04 R: 04
Claimant: Respondent (4)**

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/Requalification
Section 96.3-7 – Recovery of Overpayments

STATEMENT OF THE CASE:

Express Services, Inc. filed a timely appeal from an unemployment insurance decision dated July 6, 2004, reference 01, which allowed benefits to Michael R. Zapata. After due notice was issued, a telephone hearing was held before Administrative Law Judge Julie Elder on August 3, 2004. Following that decision Judge Elder issued a decision on August 9, 2004 in appeal 04A-UI-07615-ET. The decision disqualified Mr. Zapata for benefits and established an overpayment of \$1,694.00. Mr. Zapata appealed that decision to the Employment Appeal Board which, in an order dated November 18, 2004, remanded the case for another hearing because of a tape recorder malfunction. After due notice was issued, a telephone hearing was

held December 14, 2004 with Mr. Zapata participating and presenting additional testimony by Katie Zapata. Staffing consultants Celeste Stapler and Tami Eimen participated for the employer. The administrative law judge takes official notice of agency benefit payment records and wage records.

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: Michael R. Zapata was employed by Express Services, Inc. from May 24, 2004 until he was discharged June 8, 2004.

The employer's employment questionnaire asks applicants if they have ever been convicted of any criminal offense. Mr. Zapata indicated on the form that he had not been convicted of any criminal offense. In a follow-up interview, staffing consultant Tami Eimen asked essentially the same question of Mr. Zapata, clearly indicating the company was interested in convictions for felony and non-felony offenses. Mr. Zapata stated falsely that he had not been convicted of any criminal offense.

On October 3, 2001 Mr. Zapata had been convicted of a crime which is defined in Iowa law as an aggravated misdemeanor. When Express Services, Inc. learned of the conviction, it discharged Mr. Zapata. Mr. Zapata received unemployment insurance benefits in the gross amount of \$1,694.00. His weekly benefit amount is \$242.00. Following his employment with Express Services, Inc. Mr. Zapata has earned wages in the gross amount of \$2,638.00 from Advance Services, Inc. After the end of the latter employment, Mr. Zapata filed an additional claim for benefits effective October 10, 2004.

REASONING AND CONCLUSIONS OF LAW:

The issue before the administrative law judge concerns the unemployment insurance consequences of Mr. Zapata's discharge in June 2004. For the reasons which follow, the administrative law judge concludes that the separation was a disqualifying event, that Mr. Zapata has received unemployment insurance benefits to which he is not entitled but that he has requalified as of October 10, 2004.

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).

The employer has the burden of proof. See Iowa Code section 96.6-2. The evidence in the record persuades the administrative law judge that Mr. Zapata twice answered falsely to the question of whether he had ever been convicted of any criminal offense. The administrative law judge finds the testimony from the employer as to the text of the written question and as to the oral version of the question to be more credible than Mr. Zapata's testimony in this regard. The administrative law judge concludes that the claimant was guilty of misconduct in providing a deliberately false answer during his application process. Pursuant to the statute, benefits must be withheld from the date of that separation until Mr. Zapata has requalified by earning ten times his weekly benefit amount in wages for insured work.

Agency wage records establish that Mr. Zapata had requalified because of subsequent earnings prior to his additional claim for benefits effective October 10, 2004. Benefits are allowed as of October 10, 2004 provided that the latter separation was not a disqualifying event.

The benefits which Mr. Zapata received before October 10, 2004 were paid in error. They must be recovered in accordance with the provisions of Iowa Code section 96.3-7.

DECISION:

The unemployment insurance decision dated July 6, 2004, reference 01, is modified. Mr. Zapata's separation from employment on June 8, 2004 was a disqualifying event. Benefits are withheld from that date until the date of his additional claim, October 10, 2004. He is entitled to receive unemployment insurance benefits as of October 10, 2004, provided he is otherwise eligible. He has been overpaid by \$1,694.00 for the benefits he received between June 8, 2004 and October 10, 2004.

b/tjc