IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JOSEPH B PRITCHARD
Claimant

EXPRESS SERVICES INC
Employer

APPEAL NO. 11A-UI-15552-S2T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/13/11
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Joseph Pritchard (claimant) appealed a representative's December 6, 2011 decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits because he was discharged from work with Express Services (employer) for insubordination in connection with his work. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for January 3, 2012. The claimant participated personally. The employer participated by Deborah Beighley, Franchise Owner.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on May 23, 2011, as a temporary worker. The claimant signed for receipt of the employer's handbook on September 29, 2011. The claimant's first assignment ended due to absenteeism related to transportation on his last day. The employer did not notify the claimant that he would be terminated for any further infractions.

On August 7, 2011, the claimant was assigned to work at Con-Trol Container as a full-time tote wash. The claimant's supervisor at Con-Trol Containers regularly cursed at employees and the claimant tried to ignore it because he needed the job. After repeated cursing, the claimant complained to the supervisor's superior. On November 11, 2011, the claimant and his co-workers were waiting for work when the supervisor started cursing at them. He brought them a container so they could work. The next time the supervisor came around he said that it was his "fucking house", that he was the "fucking supervisor", and that employees should do what he "fucking" told them to do. The claimant knew the supervisor's superior was not on site and told the supervisor he was not acting professional. The line leader joined the claimant and his co-workers and they were about to start working. The supervisor told the claimant to leave. The other employees were not told to leave. Con-Trol container told the employer that the assignment ended because the claimant was told to work three times and did not do so. The employer terminated the claimant on November 11, 2011, for not working when told to do so.

The claimant believes he was terminated in retaliation for complaining about the supervisor's language.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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(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 establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). In this case there were other employees who were not working because they did not have work assigned. They were not terminated. The claimant was singled out for termination because he complained about the supervisor's inappropriate language. The employer did not provide sufficient evidence of job-related misconduct.

If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682 (Iowa 1976). The employer had the power to present testimony but chose not to do so. The employer did not provide first-hand

testimony at the hearing and, therefore, did not provide sufficient eye witness evidence of job-related misconduct to rebut the claimant's denial of said conduct. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's December 6, 2011 decision (reference 01) is reversed. The employer has not met its proof to establish job related misconduct. Benefits are allowed.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/pjs