

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

FRANK D SWALLOW
Claimant

APPEAL NO. 10A-UI-11378-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

EXPRESS SERVICES INC
Employer

**OC: 07-11-10
Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge/Misconduct
Iowa Code § 96.5(2)a – Discharge/Misconduct
871 IAC 24.32(7) – Absenteeism

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the August 13, 2010, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on September 30, 2010. The claimant did participate. The employer did participate through Jim Cole, Staffing Consultant.

ISSUE:

Was the claimant discharged due to job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was last assigned to work at Rubber Development full-time on the second shift as a painter/trimmer beginning November 10, 2009, through January 28, 2010, when he was discharged. When the claimant applied for work with the employer, he indicated that he was only available to work second or third shift and that he could not work first-shift hours. The claimant's assignment at Rubber Development was for second shift until January 28, 2010 when he was told that he had to move to first shift, as they were shutting down the second shift. The claimant told an employee of Express Services that he could not work first shift. He agreed to work one first shift on January 28, but then told them he was not available to work the first shift. When the claimant did not show up for work on January 29, he was discharged by the employer for being what they called at one time no-call-no-show. The claimant had no other instances of unexcused absenteeism and had received no prior warnings about his attendance.

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.

871 IAC 24.25(4) provides:

Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

(4) The claimant was absent for three days without giving notice to employer in violation of company rule.

Since claimant did not have three consecutive no-call, no-show absences as required by rule in order to consider the separation job abandonment, the separation was a discharge and not a quit.

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(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 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).

A failure to report to work without notification to the employer is generally considered an unexcused absence. However, one unexcused absence is not disqualifying, since it does not meet the excessiveness standard.

The claimant specifically told the employer when he was hired that he could not work first shift. He only worked second shift. The employer's change in the hours of work is considered a change in the contract of hire. The claimant was not obligated to change his hours of work. Benefits are allowed.

DECISION:

The August 13, 2010 (reference 01) decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/kjw