

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

FRANK VOGT
Claimant

APPEAL NO. 09A-UI-16056-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

EXPRESS SERVICES INC
Employer

**Original Claim: 09/20/09
Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

Frank Vogt (claimant) appealed an unemployment insurance decision dated October 26, 2009, reference 02, which held that he was not eligible for unemployment insurance benefits because he was discharged from Express Services, Inc. (employer) for work-related misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on December 1, 2009. The claimant participated in the hearing. The employer participated through Deborah Beighley, Manager. Employer's Exhibits One through Five and Claimant's Exhibit A were admitted into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

The issue is whether the employer discharged the claimant for work-related misconduct?

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was hired on August 11, 2008 and was assigned to a full-time position with Con-Trol Container Management in its fabrication department. He had repeated problems with poor attendance and insubordination. Verbal warnings were issued to him for unacceptable attendance on February 12, March 3, and August 20, 2009. The final attendance warning was for ten absences and the employer advised the claimant his job was in jeopardy if he continued to have attendance problems.

The claimant received a warning for insubordination on June 3, 2009 when he said "fuck you" to supervisor Ron Winkowitsch when he was told to get back to work. Kim Jenison issued the claimant an additional warning on August 20, 2009 for a poor attitude, which was affecting his co-workers' and his own production. This was a final warning also.

When the claimant reported to work on September 22, 2009, he indicated that he had to leave early that day. He had missed 12 days of work over the previous four months. LeRoy was standing in for Supervisor Winkowitsch and the claimant was extremely disrespectful to LeRoy.

The claimant questioned LeRoy as to why he had to answer to him and used profanity to demonstrate his lack of respect. After the insubordination and the continued attendance problems, the employer determined the claimant would be terminated from the Con-Trol work site. However, management was concerned about the claimant's anger management issues and decided to have a police officer in the parking lot on the following day for fear of some type of outburst or retaliation by the claimant. They had tried to reach the claimant by telephone that evening but were unsuccessful. The claimant was advised on September 23, 2009 that he was discharged from Con-Trol due to excessive absenteeism coupled with his abusive language, lack of respect, and insubordination to supervisors and co-workers. The police were available but were not needed.

Manager Deborah Beighley spoke with the claimant by telephone on September 23, 2009 and told him he was discharged from the employer for the same reasons he was removed from Con-Trol Container Management. The claimant replied, "Fuck you," and slammed down the phone.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. 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.

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 to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant was discharged for excessive unexcused absenteeism and repeated insubordination. Excessive unexcused absenteeism, a concept which includes tardiness, is misconduct. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The claimant was repeatedly warned but continued to miss work at an excessive rate. He was also discharged for disrespectful behavior and a use of profanity towards supervisors. An employer has the right to expect decency and civility from its employees and an employee's use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct disqualifying the employee from receipt of unemployment insurance benefits. Henecke v. Iowa Department of Job Service, 533 N.W.2d 573 (Iowa App. 1995). The claimant's conduct 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. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

DECISION:

The unemployment insurance decision dated October 26, 2009, reference 02, is affirmed. The claimant is not eligible to receive unemployment insurance benefits, because he was discharged from work for misconduct. Benefits are withheld until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/kjw