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

DIANA L ROBINSON
Claimant

APPEAL NO. 12A-UI-05904-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

EXPRESS SERVICES INC
Employer

OC: 04/29/12
Claimant: Appellant (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from a representative's decision dated May 16, 2012, reference 01, which held that the claimant was not eligible to receive unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on June 14, 2012. The claimant participated. The employer participated by Jim Cole, staffing consultant, and Nicole Cook, staffing consultant. The record consists of the testimony of Jim Cole and the testimony of Diana Robinson. Nicole Cook did not testify.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a temporary staffing service. The claimant had two different assignments while she worked for the employer. The first assignment started on August 30, 2011, and was with ASI Computer Service. The assignment ended on October 12, 2011, due to claimant's poor attendance. Her poor attendance was due to transportation problems.

The claimant was given a new assignment at Affina as a customer service representative. This assignment started on November 17, 2011. The claimant was told that if her attendance problems persisted, that she would no longer be eligible for an assignment. The claimant's attendance record was as follows:

November 22, 2011	Left Early
December 1, 2011	Tardy
December 6, 2011	Tardy
January 17, 2012	Left Early
January 23, 2012	Late
March 16, 2012	Absent

March 19, 2012   Absent
March 21, 2012   Absent
March 22, 2012   Absent

None of the claimant's absences were for personal illness. The final four absences were due to lack of transportation. On another instance, the claimant was late because her car doors froze. She also had child care issues and overslept on one occasion.

When the claimant called in on March 22, 2012, she was told that if she did not report to work, her assignment would end. The claimant did not report for work and was terminated.

REASONING AND CONCLUSIONS OF LAW:

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.

871 IAC 24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Excessive unexcused absenteeism is one form of misconduct. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The concept includes tardiness and leaving early. Absence due to matters of personal responsibility, such transportation problems and oversleeping, is considered unexcused. See Harlan v. IDJS, 350 N.W.2d 192 (Iowa 1984). The employer has the burden of proof to show misconduct.

The evidence established that the claimant was discharged for excessive unexcused absenteeism. The claimant had nine unexcused absences during her second assignment, which began on November 17, 2011. She had been taken off a previous assignment for absenteeism issues and was specifically told that she must be at work if she wanted to keep the second assignment. Although the claimant described her absences as "typical" reasons why someone would not be at work, that does not make those absences excused absences under Iowa law. Transportation is a personal responsibility and is not considered an excused absence, even if it might be a typical reason why someone would not be at work. Since the employer has shown that the claimant was discharged for excessive unexcused absenteeism, benefits are denied.

DECISION:

The representative's decision dated May 16, 2012, reference 01, is affirmed. Unemployment insurance benefits shall be withheld until the claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

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Vicki L. Seeck
Administrative Law Judge

_____
Decision Dated and Mailed

vls/kjw