IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DAVID JORDAN
Claimant

EXPRESS SERVICES INC
Employer

APPEAL NO. 09A-UI-07313-ET

ADMINISTRATIVE LAW JUDGE DECISION

Original Claim: 04-05-09
Claimant: Respondent (1)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the May 7, 2009, reference 02, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on June 5, 2009. The claimant participated in the hearing. Holly Burtness, Staffing Consultant, participated in the hearing on behalf of the employer.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time general laborer for Express Services last assigned to Aeron Advanced Manufacturing from October 13, 2008 to March 16, 2009. The client called the employer and stated the claimant was a no-call/no-show March 16 and 17, 2009, and indicated it did not want him to return to his assignment. The employer called the claimant March 18, 2009, to inform him the assignment had ended and he asked them to look for other work for him. The employer's records show the claimant said it was "too far to drive," but the claimant testified he did not say that, as the job was within walking distance of his home. He also explained that he had permission for his absences given by his manager but admitted he did not notify the employer of those absences. He continued to call the employer to let it know he was available for work, but the employer has not had any work available for him.

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.

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.

The employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000). While the employer considers the claimant to have voluntarily quit his job by failing to call or show up for work March 16 and 17, 2009, the claimant testified he had permission for his absence from his manager, who was aware his daughter was ill. Although he should have called the employer to report his absences to protect himself from a situation like this where the client says he was a no-call/no-show for two days and he says he had permission from his manager, there is no evidence to indicate the claimant intended to quit his job, which is a requirement for determining if an employee actually did voluntarily quit. Additionally, the claimant had two consecutive no-call/no-shows during this assignment rather than the three used to measure a voluntary quit. Consequently, the issue is whether he was discharged for misconduct. The administrative law judge concludes that while the claimant failed to call the employer to report his absences March 16 and 17, 2009, he had permission from his manager to be gone those two days, and the fact that he did not call the employer does not rise to the level of disqualifying job misconduct as defined by Iowa law. Therefore, benefits must be allowed.

DECISION:

The May 7, 2009, reference 02, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Julie Elder
Administrative Law Judge

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Decision Dated and Mailed

je/kjw