

**IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI**

**ROXANNE L CUBIT  
240 N 7<sup>TH</sup> ST  
CENTRAL CITY IA 52214**

**EXPRESS SERVICES INC  
PO BOX 720660  
OKLAHOMA CITY OK 73172**

**Appeal Number: 04A-UI-12212-JTT  
OC: 10/17/04 R: 03  
Claimant: Appellant (2)**

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4<sup>th</sup> Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

---

(Administrative Law Judge)

---

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct  
Section 96.4-3 – Able and Available for Work

STATEMENT OF THE CASE:

Claimant, Roxanne Cubit, filed a timely appeal from a decision of a representative dated November 10, 2004, reference 01, which held Ms. Cubit was not eligible to receive unemployment insurance benefits. After due notice was issued, a telephone conference hearing was scheduled for and held on December 6, 2004. The claimant participated personally, with witness Brenda Davis. Express Services participated by staffing consultant Celeste Staebler. Exhibits A, B, and C were received into evidence.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all of the evidence in the record, the administrative law judge finds: Roxanne Cubit was employed as a full-time temporary agency employee at Express Services from July 17, 2000 until she was discharged by Express Services franchise owner Brian Fuller on September 1, 2004 due to her medical condition. Ms. Cubit was subsequently again employed in the same position as of October 25, 2004 but was discharged by staffing consultant Celeste Staebler on October 26, 2004 due to an alleged no call/no show.

The situation that prompted Express Services franchise owner Brian Fuller to discharge Ms. Cubit on September 1, 2004 concerned Ms. Cubit's medical condition and its impact on her productivity. On July 28, 2004, Ms. Cubit began her most recent employment assignment, working as a full-time assembly line worker at Legacy Manufacturing. At the time she was discharged on September 1, Ms. Cubit was suffering from kidney stones. This condition made it necessary for Ms. Cubit to leave the assembly line to use the restroom approximately every ten minutes.

On or before September 1, Legacy Manufacturing's plant manager contacted Express Services to request Ms. Cubit's removal because she was leaving the line too frequently and was not able to perform her duties. The plant manager agreed to take Ms. Cubit back as soon as her medical condition was resolved and she was released to return to work. Mr. Fuller had his own concerns that Ms. Cubit's condition could lead to a workplace injury and workers' compensation claim.

On September 1, Mr. Fuller went to the Legacy Manufacturing plant prior to the beginning of Ms. Cubit's shift. At that time, Mr. Fuller told Ms. Cubit that it would be a good idea for her to leave. Mr. Fuller told Ms. Cubit that Express Services and Legacy Manufacturing would hold her job for her. Mr. Fuller told Ms. Cubit that when the doctor released her to return to work, she could come back to work. Ms. Cubit was willing to continue working despite her medical condition. Ms. Cubit left at Mr. Fuller's request, under the belief that she was being laid off but would get her job back as soon as she was well.

During the period away from work, Ms. Cubit kept both Express Services and Legacy Manufacturing apprised of her health status. Ms. Cubit subsequently received treatment for her kidney stones, culminating in successful removal of the stones on October 7. On October 8, Ms. Cubit telephoned Ms. Staebler at Express Services to advise she had been released to return to work. At that time, Ms. Staebler advised Ms. Cubit that neither Legacy Manufacturing nor Express Services had work for her, but that Express would keep Ms. Cubit in mind. Ms. Cubit continued to check in with Express Services and Legacy Manufacturing. On October 22, Ms. Staebler contacted Ms. Cubit to advise that Ms. Cubit could return to work at Legacy Manufacturing on October 25. Ms. Cubit accepted the assignment.

Ms. Cubit was unable to start the assignment on October 25, due to an inner ear infection. At about 6:00 a.m., prior to the scheduled start of her shift at Legacy Manufacturing, Ms. Cubit called Express Services and left a message on the answering machine. Ms. Cubit advised that she was sick and would call back later to let Express Services know her health status. When Ms. Staebler arrived for work and received Ms. Cubit's message, she contacted Legacy Manufacturing and obtained approval for Ms. Cubit to start the following day.

Ms. Cubit met with a doctor the afternoon of October 25. The doctor advised Ms. Cubit that she needed to delay going back to work for one week, and provided her with a note to that effect. Ms. Cubit shared this information with Ms. Staebler on either the afternoon of October 25 or the morning of October 26. Ms. Cubit was home with the ear infection until October 29, but was available to work after that.

On October 26, Ms. Cubit did not report to work at Legacy Manufacturing. Nor did Ms. Cubit call Express Services prior to her shift. Ms. Staebler considered this to be a no call/no show situation. Express Services' written attendance policy, contained in the employee handbook, indicates that a no call/no show situation is cause for termination. Ms. Cubit received a copy of the employee handbook. Ms. Staebler proceeded to terminate Ms. Cubit's employment.

Express Services maintained a record of its contacts with Ms. Cubit. However, Express Services did not keep a complete and accurate record of the contacts.

#### REASONING AND CONCLUSIONS OF LAW:

The first issue to be addressed is whether the evidence in this record establishes that Ms. Cubit was discharged for misconduct in connection with her employment on September 1, 2004. It does not.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

Because Ms. Cubit was discharged, Express Services bears the burden of proving the discharge was for misconduct that would disqualify Ms. Cubit from receiving unemployment benefits. See Iowa Code section 96.6(2). On September 1, Mr. Fuller discharged Ms. Cubit because of her medical condition, not because of misconduct.

The second issue to be addressed is whether the evidence in the record establishes that Ms. Cubit was discharged for misconduct in connection with her employment on October 26, 2004. It does not. Ms. Staebler discharged Ms. Cubit for a single unexcused absence on October 26, 2004. A single unexcused absence does not constitute misconduct for purposes of determining eligibility for unemployment insurance benefits. See Sallis v. Employment Appeal Board, 437 N.W.2d 895 (Iowa 1989).

The third issue to be addressed is whether the evidence in the record establishes that Ms. Cubit was able and available for work during her periods of unemployment. Ms. Cubit was not able and available for work from September 1 through October 7, due to her medical condition. Ms. Cubit was able and available for work from October 8 through October 24. Ms. Cubit was not able and available for work from October 25 through October 29, as she was under doctor's orders not to work that week, due to her inner ear infection. Ms. Cubit has been able and available to work since October 30, 2004.

No disqualification based on misconduct will enter. However, a disqualification will enter for the two periods when Ms. Cubit was not able and available for employment.

DECISION:

The representative's decision dated November 10, 2004, reference 01, is reversed. The claimant's eligibility for unemployment insurance benefits is as follows:

1. The claimant is not eligible for unemployment insurance benefits for the period of September 1, 2004 through October 7, 2004.
2. The claimant is eligible to receive unemployment insurance benefits for the period of October 8, 2004 through October 24, 2004, provided she meets all other eligibility requirements.
3. The claimant is disqualified from receiving unemployment insurance benefits for the period of October 25, 2004 through October 29, 2004.
4. The claimant is eligible to receive unemployment insurance benefits for the period beginning October 30, 2004, provided she meets all other eligibility requirements.

jt/pjs