

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**ERIC T SCHMITT**

Claimant

**APPEAL NO. 06A-UI-10453-HT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**EXPRESS SERVICES INC**

Employer

**OC: 06/28/06 R: 3  
Claimant: Respondent (2)**

Section 96.5(2)a – Discharge  
Section 96.3(7) – Overpayment

**STATEMENT OF THE CASE:**

The employer, Express Services, filed an appeal from a decision dated October 20, 2006, reference 04. The decision allowed benefits to the claimant, Eric Schmitt. After due notice was issued, a hearing was held by telephone conference call on November 9, 2006. The claimant participated on his own behalf. The employer participated by Staffing Consultant Rhonda Hall.

**ISSUE:**

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

**FINDINGS OF FACT:**

Eric Schmitt was employed by Express Services from August 28 until September 22, 2006. He was assigned to Principal Financial. On September 15, 2006, the claimant had been late to work due to transportation problems. The next day he was seen sleeping at his desk. The client notified Staffing Consultant Rhonda Hall who counseled the claimant by phone about these problems. Mr. Schmitt asserted he had been sleeping during his break in order to remain more alert to do the job he had been assigned. The client did not have a firm break time established for the employees and it was not able to confirm or deny he had been on a break at the time he was sleeping.

On September 20, 2006, the claimant was again tardy due to oversleeping. The client representative contacted Ms. Hall on September 22, 2006, and asked that the claimant be removed from the assigned. She notified Mr. Schmitt that same day he was not to return to that assignment.

Eric Schmitt has received unemployment benefits since filing an additional claim with an effective date of September 24, 2006.

## 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(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 claimant was removed from the assignment for two tardies in 20 days of work. The tardies were due to purely personal considerations such as transportation and oversleeping, which are not considered excused. Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). Given the very short period he was employed, and the fact he was counseled about it, the administrative law judge does consider this to be excessive. Under the provisions of the above Administrative Code section, this is misconduct for which the claimant is disqualified.

The issue of sleeping on the job was not considered by the administrative law judge because the employer failed to establish that he was sleeping when he should have been working rather than on his break as he asserted.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The claimant has received unemployment benefits to which he is not entitled. These must be recovered in accordance with the provisions of Iowa law.

**DECISION:**

The representative's decision of October 20, 2006, reference 04, is reversed. Eric Schmitt is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount, provided he is otherwise eligible. He is overpaid in the amount of \$1,020.00.

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Bonny G. Hendricksmeier  
Administrative Law Judge

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Decision Dated and Mailed

bgh/cs