

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**CHAD W BUSH**  
Claimant

**APPEAL NO. 15A-UI-11999-B2T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**EXPRESS SERVICES INC**  
Employer

**OC: 10/04/15**  
**Claimant: Respondent (3)**

Iowa Admin. Code r. 871-24.23(26) – Part-Time Worker – Same Wages and Hours  
Iowa Code § 96.4-3 – Able and Available

**STATEMENT OF THE CASE:**

Employer filed an appeal from a decision of a representative dated October 21, 2015, reference 01, which held claimant able and available for work. After due notice, a hearing was scheduled for and held on November 16, 2015. Claimant participated personally. Employer participated by Shea Ricketts. Employer's Exhibit One was admitted into evidence

**ISSUES:**

The issues are whether claimant is still employed at the same hours and wages and partially unemployed.

**FINDINGS OF FACT:**

Claimant worked for employer as a welder. Claimant was placed at Control, where he worked full time. On August 28, 2015, a supervisor believed claimant was acting strangely. The supervisor asked claimant to submit a body fluid sample for alcohol testing. Claimant refused this request and was asked to leave the business.

Claimant then called employer and alerted that he was no longer placed at Control. Claimant explained that he was let go. Employer did not pursue the causes of the termination. Claimant did continue to be in contact with employer. On November 10, 2015, employer discharged claimant after finding out at the fact-finding interview with IWD that claimant refused to submit a fluid specimen for testing on August 28, 2015 in violation of company policies. Employer read a portion of the company policy used to terminate claimant which stated that a person would be removed from a placement for a positive test or refusal to test and not be allowed to secure future placements until that employee would come in to employer's office and submit to testing to show that they were not positive for intoxicants. Claimant was never asked to come in and submit to other testing but was instead just terminated.

## REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

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.

Iowa Admin. Code r. 871-24.32(1)a and (8) 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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

(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.

Claimant has remained able and available for work at all times relevant to this matter. Claimant has consistently stayed in touch with his employer since the date of discharge from his most recent placement.

Employer has terminated claimant based on claimant's refusal to submit to testing for intoxicants at his placement with Control. 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. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982), Iowa Code § 96.5-2-a.

The employer bears the burden of proving that a claimant is disqualified from receiving benefits because of substantial misconduct within the meaning of Iowa Code section 96.5(2). *Myers*, 462 N.W.2d at 737. 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. Because our unemployment compensation law is designed to protect workers from financial hardships when they become unemployed through no fault of their own, we construe the provisions "liberally to carry out its humane and beneficial purpose." *Bridgestone/Firestone, Inc. v. Emp't Appeal Bd.*, 570 N.W.2d 85, 96 (Iowa 1997). "[C]ode provisions which operate to work a forfeiture of benefits are strongly construed in favor of the claimant." *Diggs v. Emp't Appeal Bd.*, 478 N.W.2d 432, 434 (Iowa Ct. App. 1991).

Employee misconduct must be a current act in order to deny unemployment benefits. *Myers v. Iowa Dep't of Job Serv.*, 373 N.W.2d 507 (Iowa Ct. App. 1985). In this matter, the evidence fails to establish that claimant was discharged for an act of misconduct when claimant violated employer's policy concerning unwillingness to submit to drug testing. Claimant was not warned concerning this policy.

The last incident, which brought about the discharge, fails to constitute misconduct because the incident was not recent enough in time to constitute a current act under Iowa law. Employer knew or should have known of the facts or circumstances surrounding claimant's separation from his placement with Control, but did nothing for over two months towards disciplining or terminating claimant. The administrative law judge holds that claimant was not discharged for an act of misconduct and, as such, is not disqualified for the receipt of unemployment insurance benefits.

**DECISION:**

The October 21, 2015, reference 01, decision is affirmed. Claimant is and has remained able and available for work through all relevant time periods, and the recent discharge of claimant was not for a current act such that it would disqualify him from the receipt of benefits; should claimant otherwise be qualified.

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Blair A. Bennett  
Administrative Law Judge

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Decision Dated and Mailed

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