

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOSEPH W CARTER
Claimant

APPEAL NO: 10A-UI-02680-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

EXPRESS SERVICES INC
Employer

OC: 07/12/09
Claimant: Appellant (2/R)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Joseph W. Carter (claimant) appealed a representative's February 10, 2010 decision (reference 04) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with Express Services, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 5, 2010. This appeal was consolidated for hearing with one related appeal, 10A-UI-02681-DT. The claimant participated in the hearing. Debra Beighley appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The employer is a temporary employment firm. The claimant's first and only assignment began on October 30, 2005. He worked full time as a general laborer/forklift driver for the employer's Waterloo, Iowa business client on a 6:00 a.m. to 2:30 p.m., Monday through Friday schedule. His last day on the assignment was January 12, 2010. The business client informed the employer on January 13, 2010 that the assignment was ended because the claimant had an unexcused absence from work that day.

The claimant had 25 absences in 2009, but these were all considered excused as they were due to properly reported illness. The most recent warning the claimant had been given due to attendance was a suspension given to him in October 2007. The claimant was absent on January 13, 2010, but had called in to report the absence that morning before the start of his shift.

The reason for the claimant's absence was two-fold: first, the claimant's home had been broken into on January 8, 2010, and on the afternoon of January 12 he received a call from the police asking for him to come in early the next morning to meet with a police officer regarding the

issue, which he did at about 7:00 a.m. Second, the claimant had been battling an illness, which had previously resulted in a week's hospitalization, and he had a follow-up appointment with his doctor at about 10:00 a.m. He realized in hindsight that since he was aware in advance of that doctor's appointment he should have scheduled time off for the appointment in advance. However, since his last warning regarding attendance had been in October 2007, he did not realize that the absence that day was likely to result in his termination.

Some evidence was presented that after the ending of the initial assignment, the employer may have made and the claimant may have declined offers of other assignments.

REASONING AND CONCLUSIONS OF LAW:

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. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is the unexcused absence on January 13, 2010. Absenteeism can constitute misconduct; however, to be misconduct, absences must be both excessive and unexcused. 871 IAC 24.32(7). A determination as to whether an absence is excused or unexcused does not rest solely on the interpretation or application of the employer's attendance policy. Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional, even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the absence under its attendance policy. 871 IAC 24.32(7); Cosper, supra; Gaborit v. Employment Appeal Board, 734 N.W.2d 554 (Iowa App. 2007). First, it is not clear that the circumstances of the claimant's January 13 absence were such as should be treated as "unexcused" for purposes of unemployment insurance benefits. However, even if it is treated as unexcused, the record does not establish that the claimant had "excessive unexcused"

absences, particularly not in any period current to the point of discharge. 871 IAC 24.32(8). Further, in order to establish the necessary element of intent, the final incident must have occurred despite the claimant's knowledge that the occurrence could result in the loss of his job. Cosper, supra; Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). The claimant did not have this intent. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

An issue as to whether the claimant refused a suitable offer of work, and if so, whether it was with or without good cause, arose during the hearing. This issue was not included in the notice of hearing for this case, and the case will be remanded for an investigation and preliminary determination on that issue. 871 IAC 26.14(5).

DECISION:

The representative's February 10, 2010 decision (reference 04) is reversed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible. The matter is remanded to the Claims Section for investigation and determination of the work refusal issue.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/css