

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

AMBER L CAVANAUGH
Claimant

APPEAL NO. 09A-UI-01854-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

EXPRESS SERVICES INC
Employer

**OC: 12/14/08 R: 04
Claimant: Appellant (1)**

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from a representative's decision dated January 30, 2009, reference 01, which denied unemployment insurance benefits based upon her separation from Express Services Inc. After due notice was issued, a telephone conference hearing was scheduled for and held on February 25, 2009. The claimant participated personally. The employer participated by Matt Timmerman, Company Owner.

ISSUE:

At issue in this matter is whether the claimant was discharged for misconduct in connection with her work.

FINDINGS OF FACT:

The administrative law judge having heard the testimony and considered all of the evidence in the record, finds: The claimant most recently worked for this temporary employer from September 10, 2008 until December 10, 2008 when she was discharged by the employer. Ms. Cavanaugh was assigned to work as a production worker at Eagle Window and Door Company and was paid by the hour. Under the attendance policy of Eagle Window and also adopted by Express Services employees are subject to discharge if they exceed eight occurrences of absences during their rolling six month period. Ms. Cavanaugh had been notified that she was close to discharge based upon her poor attendance at Eagle Window and Door. On Sunday, December 7, the claimant informed Mr. Timmerman that she had a doctor's appointment scheduled for the following morning, December 8, 2008. Mr. Timmerman responded in effect that the claimant would not be assessed an attendance occurrence for the doctor's appointment and that the claimant should report for regularly scheduled work at Eagle Window and Door on Tuesday, December 9, 2008. It was reported by Eagle Window and Door that the claimant had not reported for work on Tuesday, December 9. The employer believed that the claimant again had not reported for scheduled work and that the additional infraction would have resulted in the claimant's termination from employment. Express Services was not informed by Eagle Window and Door of any problems associated with access to the facility via

company badges and thus concluded that the claimant had chosen not to continue reporting for work.

It is the claimant's position that she attempted to report back to work on Tuesday, December 9, 2008 but was unable to gain access to the facility by swiping her identification badge. Ms. Cavanaugh did not attempt to contact her employer, Express Services Inc. on Tuesday, December 9 to inform them of her inability to gain access to the facility or to verify her employment status. The claimant "figured" that she had been discharged from employment.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that the claimant was separated under disqualifying conditions. It does.

The evidence in the record establishes that Ms. Cavanaugh had been assigned through Express Services to work in a long-term assignment at Eagle Window and Door and that because of repeated attendance violations her employment was in jeopardy. For reasons that are unclear the claimant did not inform Express Services that she would be unable to report for work on Monday, December 8, 2008 due to a doctor's appointment. The claimant instead waited until she happened to encounter Mr. Timmerman, Express Services owner, socially the day before and then informed the company owner that she would not be reporting. Based upon the concerns that Ms. Cavanaugh expressed about her continued employability, Mr. Timmerman intervened and specifically instructed the claimant that she would continue to be employed and that she was to report to the client location the next working day Tuesday, December 9, 2008. The claimant was employed by Express Services and the instruction given to the claimant by the company owner was both reasonable and work related given by Eagle Window and Door. The temporary employer did not believe the claimant had reported as instructed and the claimant's employment with the company was ended. Ms. Cavanaugh had not called in to report any difficulty on Tuesday, December 9, although she was aware that she was employed by Express Services Inc. and that she had a mandatory duty to report any absences or work-related issues to her employer, Express Services Inc.

Although the administrative law judge is cognizant that the claimant has expressed numerous reasons for not calling in, the administrative law judge concludes that the claimant's testimony strains credibility. Company policy as well as common sense would require that an employee who was not granted access to a client location would immediately contact her temporary employer to report the matter and or to determine his or her status with the company. The administrative law judge concludes that the claimant's failure to report or in the alternative her failure to provide necessary and timely information to her employer regarding her inability to report, showed a willful disregard for the employer's interests and standards of behavior and thus was disqualifying conduct under the provisions of the Employment Security Act.

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.

For the reasons stated herein the administrative law judge concludes the claimant was discharged under disqualifying conditions. Benefits are withheld.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a

continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this states pursuant to section 602.10101.

DECISION:

The representative's decision dated January 30, 2009, reference 01, is affirmed. The claimant was discharged under disqualifying conditions. Unemployment insurance benefits are withheld until the claimant has worked in and has been paid wages for insured work equal to ten times claimant's weekly benefit amount, providing that she is otherwise eligible.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

css/css