

**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**

**WILEEN K ZIPSE-GRIMM  
1208 N 6<sup>TH</sup> ST  
CLEAR LAKE IA 50428**

**EXPRESS SERVICES INC  
PO BOX 720660  
OKLAHOMA CITY OK 73172-0660**

**Appeal Number: 04A-UI-11836-RT  
OC: 01/04/04 R: 02  
Claimant: Respondent (5)**

**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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct  
Section 96.5-1 – Voluntary Quitting  
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Express Services, Inc., filed a timely appeal from an unemployment insurance decision dated October 28, 2004, reference 05, allowing unemployment insurance benefits to the claimant, Wileen K. Zipse-Grimm. After due notice was issued, a telephone hearing was held on November 24, 2004, with the claimant participating. Andre Smith, Staffing Consultant, participated in the hearing for the employer. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The employer is a temporary employment agency or firm. The claimant has been employed by it, off and on, since June 25, 1996. On May 17, 2004, the claimant was assigned to Suntron for an assignment, which was apparently to end on August 28, 2004, but it had been set to end previously but had been repeatedly extended. The claimant did not satisfactorily complete that assignment being discharged by Suntron for attendance on August 25, 2004. The employer was notified by Suntron and then the employer called and left a message for the claimant on August 25, 2004. The claimant called back and spoke to someone at Suntron and asked for another assignment. She was told that the employer was going to attempt to place the claimant in another assignment but that nothing was available. The claimant continued to call the employer once a week. The claimant was eventually given another assignment on October 7, 2004, which she satisfactorily completed on November 19, 2004. The employer has a rule or policy that requires that employees notify the employer and the assignee within five hours before the employee's shift is to start and further has a rule or policy that requires that an employee notify the employer, Express Services, Inc., within 48 hours after the completion of an assignment and seek reassignment.

While assigned to Suntron, the claimant had a number of absences. She was absent on June 21, 22, and 25, 2004 all for personal illness. These absences were properly reported both to the employer and to Suntron as per the employer's policies. On July 8, 2004, the claimant was absent after requesting the time off by Suntron and her request being approved by Suntron. The claimant properly notified the employer. On July 30, 2004, the claimant left four hours early to spend time with her son for his birthday and the son lived out of state. The claimant had permission from Suntron to leave work early and the claimant properly notified the employer that she was going to leave work early. On August 12, 2004, the claimant was absent for a tooth problem. She reported to work but the tooth hurt so bad that she was told by Suntron to go to the dentist and the claimant did so. She was absent that day and properly notified the employer as well as Suntron. On August 19, 2004, the claimant was absent one and one-half hours for a dentist appointment. She needed a follow-up appointment because of her tooth. This was properly reported to the employer and Suntron. On August 23 and 25, 2004, the claimant was absent for personal problems having serious and substantial difficulties with her husband. Both of these absences were properly reported to the employer and to Suntron. The only warning the claimant got for attendance was a verbal warning on June 21, 2004.

Pursuant to her claim for unemployment insurance benefits filed effective January 4, 2004 and reopened effective October 3, 2004 following her separation from the employer on August 25, 2004, the claimant has received unemployment insurance benefits in the amount of \$25.00 for benefit week ending October 9, 2004. Thereafter, the claimant has showed or reported earnings sufficient to cancel benefits. Presently pending, is a request by the claimant to backdate her reopened claim from October 3, 2004 back to August 25, 2004 when she separated from the employer. This issue is presently on appeal set for an appeal hearing on December 8, 2004 at 3:00 p.m.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.
2. Whether the claimant is overpaid unemployment insurance benefits. She is 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, (7) provide:

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).

(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.

Iowa Code Section 96.5-1-j provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department, but the individual shall not be disqualified if the department finds that:

j. The individual is a temporary employee of a temporary employment firm who notifies the temporary employment firm of completion of an employment assignment and who seeks reassignment. Failure of the individual to notify the temporary employment firm of completion of an employment assignment within three working days of the completion of each employment assignment under a contract of hire shall be deemed a voluntary quit unless the individual was not advised in writing of the duty to notify the temporary employment firm upon completion of an employment assignment or the individual had good cause for not contacting the temporary employment firm within three working days and notified the firm at the first reasonable opportunity thereafter.

To show that the employee was advised in writing of the notification requirement of this paragraph, the temporary employment firm shall advise the temporary employee by requiring the temporary employee, at the time of employment with the temporary employment firm, to read and sign a document that provides a clear and concise explanation of the notification requirement and the consequences of a failure to notify. The document shall be separate from any contract of employment and a copy of the signed document shall be provided to the temporary employee.

For the purposes of this paragraph:

(1) "Temporary employee" means an individual who is employed by a temporary employment firm to provide services to clients to supplement their work force during absences, seasonal workloads, temporary skill or labor market shortages, and for special assignments and projects.

(2) "Temporary employment firm" means a person engaged in the business of employing temporary employees.

The parties seem to concede that the claimant was discharged on August 25, 2004 from her assignment with Suntron, and the administrative law judge so concludes. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. Excessive unexcused absenteeism is disqualifying misconduct and includes tardies and necessarily requires the consideration of past acts and warnings. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). It is well established that the employer has the burden to prove disqualifying misconduct, including excessive unexcused absenteeism. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct, namely, excessive unexcused absenteeism. The claimant's absences and occasions when she left work early are set out in the Findings of Fact. On three occasions, the claimant was absent for illness in June 2004 and these absences were properly reported both to the employer and to the assignee, Suntron. The claimant was also absent on

July 8, 2004 and July 30, 2004 with the permission of the assignee Suntron and the employer was properly notified of both of those. On August 12 and 19, 2004, the claimant was absent because of serious teeth problems and both of these absences were properly reported to the employer and to Suntron. These two absences were really for personal illness and properly reported. Finally, the claimant was absent on August 23 and 25, 2004 for substantial and serious personal problems involving her husband and both of these absences were properly reported to both the employer and Suntron. The administrative law judge concludes that under the circumstances here, these two absences were for reasonable cause and also properly reported. Accordingly, the administrative law judge concludes that all of the claimant's absences were for personal illness or reasonable cause and properly reported and are not excessive unexcused absenteeism. The administrative law judge also notes that the claimant only received one warning, a verbal warning, on June 21, 2004, over three months before the claimant was discharged. Therefore, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct and, as a consequence, she is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits, and misconduct, to support a disqualification from unemployment insurance benefits, must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant her disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided she is otherwise eligible.

The administrative law judge notes that the employer here was a temporary employment agency and that an individual who fails to notify a temporary employment firm of completion of an assignment within three working days of the completion of the assignment and to seek reassignment shall be deemed a voluntary quit unless the individual was not advised in writing of the duty to notify the temporary employment firm upon completion of unemployment assignment within three working days. Here, the claimant credibly testified that she contacted the employer and sought reassignment immediately upon learning of the termination of her assignment. Further, the employer's rule requires that an employee notify the employer within 48 hours and this is not in compliance with Iowa Code section 96.5-1-j which requires three working days and therefore Section 96.5-1-j would not apply to the claimant here.

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 administrative law judge concludes that pursuant to her claim for unemployment insurance benefits filed effective January 4, 2004 and reopened effective October 3, 2004, that the claimant has received unemployment insurance benefits in the amount of \$25.00 for benefit week ending October 9, 2004. The administrative law judge also notes that the claimant has on appeal a decision prohibiting her from backdating her claim to her separation date, August 25, 2004. The administrative law judge reaches no conclusion on that issue noting that an appeals hearing is pending for December 8, 2004 at 3:00 p.m. However, if the claimant is allowed to backdate her claim, she would be entitled to benefits for the period following her separation from the employer herein on or about August 25, 2004.

DECISION:

The representative's decision dated October 28, 2004, reference 05, is modified. The claimant, Wileen K. Zipse-Grimm, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she was discharged but not for disqualifying misconduct. As a result of this decision, the claimant has not been overpaid any unemployment insurance benefits which the claimant has received or to which she may become entitled as a result of her separation from the employer herein on August 25, 2004.

kjf/kjf