IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JEFFREY D WILSON
Claimant

EXPRESS SERVICES INC
Employer

APPEAL NO: 06A-UI-09184-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/29/06 R: 02
Claimant: Respondent (5)

Section 96.5-1-j – Temporary Employment
871 IAC 24.26(19) – Temporary Employment

STATEMENT OF THE CASE:

Express Services, Inc. (employer) appealed a representative's September 11, 2006 decision (reference 02) that concluded Jeffrey D. Wilson (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 27, 2006. The claimant participated in the hearing. Betty Jo (B.J.) Butler 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 there a disqualifying separation from employment?

FINDINGS OF FACT:

The employer is a temporary staffing agency. The claimant began his first and ultimately only assignments through the employer on April 11, 2006. He worked full-time as a production worker at the employer's business client through July 20, 2006. His regular work schedule was from 7:00 a.m. to 3:30 p.m., Monday through Friday. On that date the on-site supervisor informed both the claimant and the employer that it was ending the assignment due to lack of work after the end of the workday on July 21, 2006.

The claimant had previously arranged to leave work early on July 20 for a 3:00 p.m. doctor's appointment. He approached the on-site supervisor before leaving for the appointment at about 2:00 p.m. He informed the supervisor that he would not be returning for the last day of work on July 21 as since he was not going to become employed with the company permanently he needed to use the time on July 21 to find employment.

The claimant contacted the employer the morning of July 20 to see about finding a new assignment for the following week. He picked up his paycheck after his doctor's appointment, and there was a note for him to call Ms. Butler. She had arranged for him to report for a drug

test the next day, July 21, for a potential other assignment. The claimant did report and submit to drug testing. Details regarding the specimen collection process were not available, including whether a split portion of the sample was made and retained. There was no information available regarding the testing process which was followed. On July 24, the claimant received a call from the medical review officer who indicated that there was a positive result. Ms. Butler called the claimant later that day and informed him he was no longer eligible for assignment through the employer because he had a positive drug test. He was not provided with any written evidence of the test results, he was not provided with an opportunity to provide any medical information that might affect the drug test, was not given a copy of the test results and was not informed of his right to have a split portion of the sample retested.

REASONING AND CONCLUSIONS OF LAW:

The essential question in this case is whether there was a disqualifying separation from employment. There are two separations that must be considered – the separation on July 20, 2006 and the separation that occurred on July 24, 2006.

871 IAC 24.26(19) provides:

> Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:
>
> (19) The claimant was employed on a temporary basis for assignment to spot jobs or casual labor work and fulfilled the contract of hire when each of the jobs was completed. An election not to report for a new assignment to work shall not be construed as a voluntary leaving of employment. The issue of a refusal of an offer of suitable work shall be adjudicated when an offer of work is made by the former employer. The provisions of Iowa Code section 96.5(3) and rule 24.24(96) are controlling in the determination of suitability of work. However, this subrule shall not apply to substitute school employees who are subject to the provisions of Iowa Code section 96.4(5) which denies benefits that are based on service in an educational institution when the individual declines or refuses to accept a new contract or reasonable assurance of continued employment status. Under this circumstance, the substitute school employee shall be considered to have voluntarily quit employment.

871 IAC 24.25(40) provides:

> (40) Where the claimant voluntarily quit in advance of the announced scheduled layoff, the disqualification period will be from the last day worked to the date of the scheduled layoff. Benefits shall not be denied from the effective date of the scheduled layoff.

The claimant did quit the assignment on July 20, before the scheduled layoff from the assignment; however, he would only be disqualified for the week ending July 22, 2006, for which he did not seek benefits.

The next issue in this case is whether the July 24, 2006 separation was a discharge for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right to terminate the claimant's eligibility for 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 questions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

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 section 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).

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.
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> 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).

The reason cited by the employer for discharging the claimant is an allegedly positive drug test. In order for a violation of an employer's drug or alcohol policy to be disqualifying misconduct, it must be based on a drug test performed in compliance with Iowa's drug testing laws. Harrison v. Employment Appeal Board, 659 N.W.2d 581 (Iowa 2003); Eaton v. Iowa Employment Appeal Board, 602 N.W.2d 553, 558 (Iowa 1999). The Eaton court said, "It would be contrary to the spirit of chapter 730 to allow an employer to benefit from an unauthorized drug test by relying on

it as a basis to disqualify an employee from unemployment compensation benefits." Eaton, 602 N.W.2d at 558. In Harrison, the court specifically noted the statutory requirement that the employer must give the employee a written notice of the positive drug test, sent by certified mail, return receipt requested, informing the employee of his right to have the split sample tested at a laboratory of his choice and at a cost consistent with the employer's cost. The employer did not provide any written notice, by certified mail or otherwise. There are also other failures to satisfy the statute, such as showing proof of the collection process and testing method used. The employer has not substantially complied with the drug testing regulations. 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.

DECISION:

The representative's September 11, 2006 decision (reference 02) is modified with no effect on the parties. The claimant's July 20, 2006 separation was a voluntary quit prior to the effective date of the layoff from the assignment, but the disqualification was only through July 22, 2006 and does not result in any actual disqualification for any week for which benefits were claimed. As to the July 24, 2006 separation, 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, as of July 23, 2006.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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