IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JAMES L BUTLER
Claimant

TEAM STAFFING SOLUTIONS INC
Employer

APPEAL NO: 11A-UI-02746-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/17/10
Claimant: Appellant (1)

Section 96.5-1-j – Temporary Employment
871 IAC 24.26(15) – Temporary Employment
Section 96.5-2-a – Discharge
871 IAC 26.14(7) – Late Call

STATEMENT OF THE CASE:

James L. Butler (claimant) appealed a representative's March 4, 2011 decision (reference 03) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with Team Staffing Solutions, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 30, 2011. The claimant received the hearing notice and responded by calling the Appeals Section on March 16, 2011. He indicated that he would be available at the scheduled time for the hearing at a specified telephone number. However, when the administrative law judge called that number at the scheduled time for the hearing, the claimant was not available; therefore, he did not participate in the hearing. Sarah Fiedler appeared on the employer's behalf. The record was closed at 9:16 p.m. At 12:27 p.m., the claimant returned the message left by the administrative law judge at the time of the call for the hearing. Based on the evidence, the arguments of the employer, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Should the hearing record be reopened?

Was there a disqualifying separation from employment either through a voluntary quit without good cause attributable to the employer or through a discharge for misconduct?

FINDINGS OF FACT:

The claimant received the hearing notice prior to the March 30, 2011 hearing. The instructions inform the parties that they are to be available at the specified time for the hearing, and that if they cannot be reached at the time of the hearing at the number they provided, the judge may decide the case on the basis of other available evidence. The reason the claimant provided for not being available when the administrative law judge called at the time for the hearing was that

he had obtained other employment and was working at the time of the hearing, and that he thought pursuing participation in the hearing was not worth the effort.

The employer is a temporary employment firm. The claimant's first and as of the date of the hearing only assignment began on June 21, 2010. He worked full time as assembler on the third shift at the employer's Burlington, Iowa business client. His last day on the assignment was January 14, 2011. The assignment ended because the employer's business client determined to end it because the claimant was found to have fallen asleep that evening at this machine. He was informed of the ending of the assignment by the employer on January 17. When questioned about the incident by the employer on January 17, the claimant acknowledged falling asleep, indicating that it was because he was tired from working another job as well. There was no evidence that the claimant had been given any prior warnings regarding this type of conduct or any other disciplinary issues. No evidence was presented that the claimant's job duties were such that falling asleep at his station posed any unique risks or hazards to the business client.

On January 17 the claimant did not indicate any interest in obtaining any new assignment with the employer, and he did not recontact the employer seeking reassignment until March 3, immediately after the fact-finding interview conducted by the Claims representative. When he began working for the employer he had been given and had signed a statement advising him that he must seek reassignment within three working days after the ending of an assignment or he would be deemed to have voluntarily quit.

REASONING AND CONCLUSIONS OF LAW:

The Iowa Administrative Procedures Act § 17A.12-3 provides in pertinent part:

> If a party fails to appear or participate in a contested case proceeding after proper service of notice, the presiding officer may, if no adjournment is granted, enter a default decision or proceed with the hearing and make a decision in the absence of the party. … If a decision is rendered against a party who failed to appear for the hearing and the presiding officer is timely requested by that party to vacate the decision for good cause, the time for initiating a further appeal is stayed pending a determination by the presiding officer to grant or deny the request. If adequate reasons are provided showing good cause for the party's failure to appear, the presiding officer shall vacate the decision and, after proper service of notice, conduct another evidentiary hearing. If adequate reasons are not provided showing good cause for the party's failure to appear, the presiding officer shall deny the motion to vacate.

871 IAC 26.14(7) provides:

> (7) If a party has not responded to a notice of telephone hearing by providing the appeals section with the names and telephone numbers of its witnesses by the scheduled time of the hearing, the presiding officer may proceed with the hearing.
>
> a. If an absent party responds to the hearing notice while the hearing is in progress, the presiding officer shall pause to admit the party, summarize the hearing to that point, administer the oath, and resume the hearing.
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> b. If a party responds to the notice of hearing after the record has been closed and any party which has participated is no longer on the telephone line, the presiding officer shall not take the evidence of the late party. Instead, the presiding officer shall inquire as to

why the party was late in responding to the notice of hearing. For good cause shown, the presiding officer shall reopen the record and cause further notice of hearing to be issued to all parties of record. The record shall not be reopened if the presiding officer does not find good cause for the party's late response to the notice of hearing.

c. Failure to read or follow the instructions on the notice of hearing shall not constitute good cause for reopening the record.

At issue is a request to reopen the record made after the hearing had concluded. The request to reopen the record is denied because the party making the request failed to participate by reading and following the instructions on the hearing notice.

The essential question in this case is whether there was a disqualifying separation from employment. The first subissue in this case is whether the employer or the business client ended the claimant's assignment and effectively discharged him for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer or client was right or even had any other choice but 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 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 § 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).

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 or its business client for ending the claimant's assignment is his falling asleep at his work station on January 14. Under the circumstances of this case, the claimant's falling asleep that day was the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence in an isolated instance, and was a good faith error in judgment or discretion. 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.

The second subissue in this case is whether the claimant voluntarily quit his employment with the employer by failing to affirmatively pursue reassignment. An employee of a temporary employment firm who has been given proper notice of the requirement can be deemed to have voluntarily quit his employment with the employer if he fails to contact the employer within three business days of the ending of the assignment in order to notify the employer of the ending of the assignment and to seek reassignment. Iowa Code § 96.5-1-j; 871 IAC 24.26(15).

The claimant did not indicate he was available for other work with the employer or seek reassignment within three business day of being informed of the ending of the assignment on January 17. There is some suggestion that he in fact might have chosen not to be available for reassignment because of working another job. Under such circumstances he is considered to have voluntarily quit his employment with the employer, even if he subsequently sought to renew the employment relationship on March 3. The claimant has the burden of proving that the voluntary quit was for a good cause that would not disqualify him. Iowa Code § 96.6-2. The claimant has not satisfied his burden. Benefits are denied.

DECISION:

The representative's March 4, 2011 decision (reference 03) is affirmed. The claimant was released and effectively discharged from his assignment through the employer but not for disqualifying reasons. The claimant voluntarily left his employment without good cause attributable to the employer by failing to seek reassignment within three days of January 17, 2011. Benefits are withheld until such time as the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/pjs