IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

SHAWN D LUCAS
Claimant

TEMP ASSOCIATES - MARSHALLTOWN
Employer

APPEAL NO. 07A-UI-08010-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/08/07 R: 03
Claimant: Respondent (1)

Iowa Code Section 96.5(1)(j) – Separation From Temporary Employment

STATEMENT OF THE CASE:

Temp Associates - Marshalltown filed a timely appeal from the August 17, 2007, reference 03, decision that allowed benefits. After due notice was issued, a hearing was held on September 5, 2007. Claimant Shawn Lucas participated. Nancy Mullaney, Grinnell Branch Manager, represented the employer. The administrative law judge took official notice of the Agency's record of benefits paid to the claimant. The hearing in this matter was consolidated with the hearing in Appeal Number 07A-UI-08009-JTT.

ISSUES:

Whether the claimant was discharged from his work assignment for misconduct that would disqualify him for unemployment insurance benefits.

Whether the claimant's July 2, 2007 end-of-assignment separation from the temporary employment agency was for good cause attributable to the employer.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Shawn Lucas commenced his employment with Temp Associates on October 13, 2006 and worked in one assignment. At the time Mr. Lucas established his relationship with Temp Associates, the temporary employment agency notified Mr. Lucas of his obligation to contact the agency within three working days after the end of an assignment. The policy was a stand-alone policy and Mr. Lucas was provided with a copy.

Mr. Lucas' only assignment involved full-time production work at Montezuma Manufacturing in Montezuma, Iowa. Toward the end of the assignment, Mr. Lucas worked the third-shift and was paid $14.60 per hour. On June 29, 2007, a representative of the Montezuma Manufacturing Human Resources department contacted Nancy Mullaney, Temp Associates Grinnell Branch Manager, and requested that Mr. Lucas be removed from the assignment. Montezuma Manufacturing cited Mr. Lucas' attendance as the basis for his discharge from the assignment. However, Temp Associates is unable to provide information regarding specific absences.

On July 1, 2007, Ms. Mullaney attempted to contact Mr. Lucas to notify him that he had been removed from the assignment. Ms. Mullaney initially attempted to reach Mr. Lucas at the primary contact number he had provided. Ms. Mullaney eventually contacted Mr. Lucas' girlfriend on the girlfriend's cell phone. The girlfriend notified Ms. Mullaney that Mr. Lucas was sleeping. Ms. Mullaney left a message that Mr. Lucas should not report for the assignment and should contact Ms. Mullaney on Monday, July 2.

On July 2, Mr. Lucas contacted Ms. Mullaney and she advised him that he had been released from the assignment at Montezuma Manufacturing due to attendance. Ms. Mullaney and Mr. Lucas did not discuss any new assignments. The employer did not have any assignments available for Mr. Lucas at the time, but was willing to place him in additional assignments. Ms. Mullaney instructed Mr. Lucas to contact her in "a couple days" and to check in weekly for new assignments. Ms. Mullaney stressed to Mr. Lucas the importance of maintaining a contact number at which he could be reached. Mr. Lucas advised Ms. Mullaney that his girlfriend's cell phone was now his primary contact number. Mr. Lucas' girlfriend worked and was a student. Thus, the girlfriend was often not able to convey, in a timely manner, messages left for Mr. Lucas on her cell phone. Mr. Lucas was in fact ambivalent about whether he wanted to accept another assignment through Temp Associates.

Mr. Lucas did not make further contact with the employment agency until July 11, when he spoke with Account Manager Art Heinzer and advised that he was available for additional assignments.

REASONING AND CONCLUSIONS OF LAW:

The evidence in the record fails to establish that Mr. Lucas was discharged from the assignment at Montezuma Manufacturing for misconduct.

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.

The employer has the burden of proof in a discharge matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's *unexcused* absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility, such as transportation and oversleeping, are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

The employer has submitted no evidence to support the assertion that Mr. Lucas was discharged from the assignment for excessive unexcused absences or any other misconduct. Accordingly, Mr. Lucas' separation from the assignment would not disqualify him for unemployment insurance benefits.

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.
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> 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.

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:
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> (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.

The evidence in the record indicates the employer had an end-of-assignment notification policy that complied with the requirements of Iowa Code section 96.5(1)(j). The purpose of the end-of-assignment notice requirement is to notify the temporary employment agency of the temporary worker's availability for additional assignments. The evidence in the record indicates that Mr. Lucas fulfilled the notification requirement set forth in the statute. Ms. Mullaney notified Mr. Lucas on July 1 that the assignment ended and Mr. Lucas spoke directly with Ms. Mullaney the next day. Mr. Lucas' response was well within the three-day notice required by the statute. The evidence further indicates that the employer did not have any assignments for Mr. Lucas on July 2. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Lucas' separation from the temporary employment agency was for good cause attributable to the temporary employment agency. Mr. Lucas is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Lucas.

DECISION:

The Agency representative's August 17, 2007, reference 03, decision is affirmed. The claimant's separation from the temporary employment agency was for good cause attributable to the temporary employment agency. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to the claimant.

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James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

jet/kjw