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

TRINA R CORA
11800 S STATE ST
CHICAGO IL 60628

TEMP ASSOCIATES
1000 N ROOSEVELT AVE
BURLINGTON IA 52601

Appeal Number: 04A-UI-01149-RT
OC: 01-04-04 R: 12
Claimant: Appellant (2)

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, 4th 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.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct
Section 96.5-1 – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant, Trina R. Cora, filed a timely appeal from an unemployment insurance decision dated February 3, 2004, reference 01, denying unemployment insurance benefits to her. After due notice was issued, a telephone hearing was held on February 24, 2004 with the claimant participating. Jan Windsor, Manager of the Burlington, Iowa, office, participated in the hearing for the employer, Temp Associates. Employer's Exhibit 1 was admitted into evidence.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibit 1, the administrative law judge finds: The claimant was employed by the employer from July 27, 2003 until she was separated from her employment on October 16, 2003. The employer is a temporary employment agency and throughout all material times hereto the claimant was assigned to Winegard Company. When the claimant was first hired and placed at Winegard Company, there was no ending date for her assignment. Later, however, the claimant and other employees were told October 12, 2003 that their job would be ending and they would be laid off for a lack of work. The employees were then laid off effective October 16, 2003. The claimant's name was on the list of employees to be laid off. Although there was work available, the claimant was absent on October 13, October 14 and October 15 because her child was ill. Whether the claimant properly reported these absences is uncertain. October 16, 2003 was a Thursday. No later than October 20, 2003, the claimant went to the employer's office and spoke with the employer. No work was available to the claimant at that time. The employer has a rule that employees who complete an employment assignment must notify the employer within three working days and seek reassignment. The employer also has a rule that requires employees to notify both the employer and the assignee, in this case Winegard Company, of any absence. The claimant had an attendance problem. The claimant was absent on August 16, 2003; August 17, 2003; and September 24, 2003. Whether the claimant properly reported these absences is not clear. The claimant received two written warnings for her attendance on September 18, 2003 and September 25, 2003. The claimant received no other warnings.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from employment was a disqualifying event. It was not.

Iowa Code Section 96.5-1 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.

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.

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) 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.

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.

The first issue to be resolved is the character of the separation. The claimant maintains that she was laid off for a lack of work. The employer maintains that the claimant was discharged. However, the employer's witness, Jan Windsor, Manager of the Burlington, Iowa, office, could not provide a specific date when the claimant was informed of her discharge. The claimant testified that she was laid off for a lack of work when she was informed of such by the assignee, Winegard Company, on October 12, 2003. The claimant's name was then later included on a list of layoffs. Ms. Windsor testified that the claimant was discharged because of three absences as a no-call/no-show on October 13, October 14 and October 15, 2003. The claimant's discharge must have occurred after October 15, 2003 but the claimant was actually laid off or informed of a layoff on October 12, 2003. Accordingly, the administrative law judge concludes that the claimant was not discharged nor did she quit but she was laid off for a lack of work and this is not disqualifying. Unemployment insurance benefits are allowed to the claimant, provided she is otherwise eligible.

Even assuming that the claimant was discharged, the administrative law judge would conclude that the claimant was not 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 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. Even if the claimant had been discharged, the administrative law judge would conclude that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant committed any acts of disqualifying misconduct, namely excessive unexcused absenteeism. The evidence does establish that the claimant was absent a number of times as set out in the findings of fact. However, the claimant testified that these absences were because her child was ill. This evidence was unrebutted by the employer. The real issue is whether the claimant properly reported these absences. The claimant adamantly maintained that she had properly reported all of the absences. Ms. Windsor adamantly maintained that the claimant had not. Since the employer has the burden of proof here, the administrative law judge is constrained to conclude that there is not a preponderance of the evidence that the claimant did not properly report these absences. Accordingly, the administrative law judge concludes that there is not a preponderance of the evidence that the claimant's absences were excessive unexcused absenteeism and disqualifying misconduct. Therefore, the administrative law judge would conclude, should the claimant's separation be considered a discharge, she would not have been discharged for disqualifying misconduct, namely excessive unexcused absenteeism, and the claimant would not be disqualified to receive unemployment insurance benefits.

Even should the claimant's separation be considered a voluntary quit, the administrative law judge would also again conclude that the claimant would not be disqualified to receive

unemployment insurance benefits. The claimant was an employee of a temporary employment firm and did notify the employer of the completion of her assignment and seek reassignment within three working days. The evidence establishes that the claimant was laid off effective October 16, 2003, which was a Thursday. The evidence also establishes that the claimant showed up at the employer's location on October 20, 2003, a Monday, which would be the third working day. The claimant complied with the employer's rule. The claimant testified that she had sought reassignment on October 16 and October 17 but Ms. Windsor strongly disagreed. The claimant testified that she had signed a logbook but Ms. Windsor testified there was no showing that she had signed such a logbook on those two days. However, all of the parties agree that the claimant showed up at the employer on October 20, 2003. Since the claimant did show up on that day, the administrative law judge must assume in the absence of any clear evidence to the contrary that the claimant, in some fashion, informed the employer of the layoff and sought reassignment. Accordingly, even should the claimant's separation be considered a voluntary quit, the administrative law judge would conclude that the claimant should not be disqualified as a result of that voluntary quit because she notified the employment firm and sought reassignment within three working days of the layoff. The administrative law judge further notes that, even if the claimant's three days absence as a no-call/no-show was considered a voluntary quit on October 13, 2003, the claimant quit in the face of a layoff and would only be disqualified from the last day worked, the date of the scheduled layoff which was October 16, 2003. The claimant did not file for unemployment insurance benefits until an effective date of January 4, 2004 and, therefore, she would not have filed for any unemployment insurance benefits before she was laid off.

DECISION:

The representative's decision of February 3, 2004, reference 01, is reversed. The claimant, Trina R. Cora, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she was laid off for a lack of work.

tjc/b