

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

BRIAN L EVANS  
APT #1  
206 W THOMAS  
SHENANDOAH IA 50601

MANPOWER INTERNATIONAL INC  
MANPOWER TEMPORARY SERVICES  
C/O TALX UC EXPRESS  
PO BOX 66864  
ST LOUIS MO 63166-6864

Appeal Number: 05A-UI-12050-DT  
OC: 10/23/05 R: 01  
Claimant: Respondent (1)

**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 96.5-1-j – Temporary Employment  
871 IAC 24.26(19) – Temporary Employment  
Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Manpower International, Inc. (employer) appealed a representative's November 18, 2005 decision (reference 02) that concluded Brian L. Evans (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 December 13, 2005. The claimant participated in the hearing. Todd Aschenfelter 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 employment firm. The claimant began taking assignments with the employer on February 8, 2004. His final assignment began on May 31, 2005. He worked full time as an inspector/materials handler at the employer's business client. His last day on the assignment was August 20, 2005. The assignment ended because the employer's business client determined to end it because of absences from work.

The claimant's regular work schedule was from 7:00 a.m. to 3:10 p.m., Monday through Friday, plus regular Saturday overtime. On Monday, August 22, the claimant left home shortly after 6:00 a.m. to drive the 18 miles from his home in Shenandoah, Iowa, to the business client's workplace in Clarinda, Iowa. About five or six miles out of Shenandoah, the claimant hit a deer, rendering his vehicle undrivable. He walked back to Shenandoah, arriving at his home between 7:00 a.m. and 8:00 a.m. He called a friend, who immediately came over with a car and picked the claimant up. They drove out to the claimant's car to pull it back into town. On the way, the claimant borrowed the friend's cell phone and called his supervisor at the business client to report what had happened, and that he would be in to work later that morning.

The claimant and his friend got the car back to town shortly before 9:00 a.m. As the claimant prepared to go to work and was waiting for a ride, he called the employer's office to report what had happened. Shortly thereafter, the employer called him back and stated that the business client had decided to end the assignment due to the claimant's failure to report to work that day plus some prior absences.

The claimant had missed three days of work due to illness around July 6, 2005; he had been late or absent due to hitting another deer on July 21, 2005, and the employer reflected that he was absent for unknown reasons on August 4 and August 5, 2005. There was some question as to whether the claimant had properly called both the business client and the employer's office to report those incidents. On August 8, 2005, the employer's on-site supervisor had a discussion with the claimant regarding his attendance.

REASONING AND CONCLUSIONS OF LAW:

The essential question in this case is whether there was a disqualifying separation from employment when the business client, through the employer, ended the claimant's assignment. 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 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).

The focus of the definition of misconduct is on acts or omissions by a claimant that “rise to the level of being deliberate, intentional or culpable.” Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer’s interest, such as found in:
  - a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
  - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
  - a. Manifest equal culpability, wrongful intent or evil design; or
  - b. Show an intentional and substantial disregard of:
    1. The employer’s interest, or
    2. The employee’s duties and obligations to the employer.

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.

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).

871 IAC 24.32(7) provides:

(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 reason the employer was forced to discharge the claimant from his assignment was his attendance. In order to be misconduct, absenteeism must be both excessive and unexcused. The record does not establish that the claimant's absences were both excessive and unexcused. Absences due to bona fide emergencies cannot constitute work-connected misconduct since they are not volitional, even if the employer was fully within its rights to assess points or impose discipline for the absence under its attendance policy. Cosper, supra. Because the final absence was due to the reasonable ground of an unavoidable and bona fide emergency, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct and no disqualification is imposed. In this case, the employer asserts that the reason for the final tardy was not properly reported and should therefore be considered unexcused. However, it is clear that the claimant's failure to report his tardy to both the employer and the business client before 9:00 a.m. was also not volitional, as the claimant was understandably shaken and not thinking clearly about all steps he could take as to notification after the collision with the deer. The employer has failed to meet its burden to establish misconduct. Cosper, supra. The claimant's absences do not establish his actions were misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

#### DECISION:

The representative's November 18, 2005 decision (reference 02) is affirmed. 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.

ld/kjw