

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DAVID A PARR
Claimant

APPEAL NO. 07A-UI-02286-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TEMPS NOW HEARTLAND LLC
Employer

**OC: 02/04/07 R: 04
Claimant: Appellant (2)**

Iowa Code section 96.5(1)(j) – Separation for Temporary Employment Agency
Iowa Code section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absences

STATEMENT OF THE CASE:

David Parr filed a timely appeal from the March 1, 2007, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on March 22, 2007. Mr. Parr participated. Miriam Arugete of Personnel Planners represented the employer and presented testimony through Krista Kenady, Office Manager.

ISSUES:

Whether the claimant was discharged from his temporary employment assignment for misconduct in connection with the employment, based on excessive unexcused absences, that disqualifies him for unemployment insurance benefits.

Whether the claimant separated from the temporary employment agency for a reason that disqualifies him for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: David Parr commenced his employment relationship with Temps Now Heartland temporary employment agency on December 4, 2006 and had only one assignment. Mr. Parr was placed in a full-time general laborer assignment at Erie Foods in Erie, Illinois, and continued in that assignment until January 26, when Erie foods discharged him from the assignment for exceeding the maximum allowable attendance points. Temps Now Heartland and Erie Foods each had an attendance policy applicable to Mr. Parr. Temps Now Heartland's policy required Mr. Parr to notify the temporary employment agency at least one hour prior to the scheduled start of his shift if he needed to be absent. Erie Food's policy required Mr. Parr to notify Erie Foods at least one hour prior to his scheduled shift. Mr. Parr was aware of both policies and his obligation to report absence to Erie Foods and Temps Now Heartland.

The final absence that prompted the discharge from the assignment occurred on January 22, 2007, when Mr. Parr was absent because he could not get his car started. Mr. Parr had been

absent on December 12, 2006, due to fog that made the 20-mile trip to the assignment impossible. Mr. Parr properly reported this absence. Mr. Parr was engaged in a search for permanent employment while he was in the temporary assignment and was absent due to job interviews on December 18, December 28, and January 15. Mr. Parr had properly reported these absences to his supervisor at Erie Foods prior to the date he needed to be absent and the absences had been approved by the supervisor at Erie Foods. Mr. Parr had also properly reported these absences to Temps Now Heartland on the date of the absences. Though the supervisor at Erie Foods had approved Mr. Parr's absences on December 18, 28, and January 15, Erie Foods nonetheless assigned attendance points to these absences and others. The Temps Now Heartland employee who had contact with Erie Foods and/or Mr. Parr concerning Mr. Parr's absences is on maternity leave and did not testify. In addition, the employer did not present testimony from the supervisor at Erie Foods.

Temps Now Heartland notified Mr. Parr that he had been discharged from the assignment at Erie Foods. Temps Now Heartland did not have a policy that required Mr. Parr to report to the Agency within three days of the completion of an assignment to indicate that he was available for a new assignment. The temporary employment agency did require Mr. Parr to call in once a week. Mr. Parr did not commence a new assignment.

REASONING AND CONCLUSIONS OF LAW:

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).

The employer has the burden of proof in this 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 Mr. Parr's absences to constitute misconduct that would disqualify him from receiving unemployment insurance benefits, the evidence must establish that his *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 largely failed to present sufficiently direct and satisfactory evidence to establish that Mr. Parr's absences from the assignment were unexcused absences under the applicable law. The employer had the obligation and ability to prevent more direct and satisfactory evidence than was produced. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976) and 871 IAC 24.32(4). The greater weight of the evidence in the record establishes that Mr. Parr's absence on January 22 was due to a lack of personal transportation and, therefore, was an unexcused absence under the applicable law. The evidence indicates that Mr. Parr's absence on December 12 was due to roads made impassable by fog. The weather was a matter outside Mr. Parr's control. The evidence indicates that Mr. Parr properly notified Erie Foods and Temps Now Heartland of the absence. The absence was an excused absence under the applicable law. The greater weight of the evidence indicates that Mr. Parr's absences on December 18, December 28, and January 15, were properly reported and approved by the Erie Foods supervisor prior to the day of the absence. The evidence indicates that these absences were also properly reported to

Temps Now Heartland. The administrative law judge concludes these were excused absences. The greater weight of the evidence indicates that Mr. Parr was not scheduled to work on December 25, 26, or January 1.

The greater weight of the evidence establishes only one absence that would be unexcused under the applicable law. However, one unexcused absence does not constitute misconduct. Sallis v. EAB, 437 N.W.2d 895 (Iowa 1989).

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Parr was discharged from the assignment with Erie Foods for no disqualifying reason. Accordingly, Mr. Parr would be eligible for benefits, provided he was otherwise eligible.

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.

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.

The greater weight of the evidence indicates that the employer did not have a policy that complied with the requirements set forth in Iowa Code section 96.5(1)(j). According, Mr. Parr's election not to commence a further assignment would not disqualify him for unemployment insurance benefits. The administrative law judge concludes that Mr. Parr's separation from the temporary employment agency was for good cause attributable to the employer. Mr. Parr is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Parr.

DECISION:

The Agency representative's March 1, 2007, reference 01, decision is reversed. The claimant was discharged from his temporary employment assignment for no disqualifying reason. 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs