

**BEFORE THE  
EMPLOYMENT APPEAL BOARD  
Lucas State Office Building  
Fourth floor  
Des Moines, Iowa 50319**

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**STEVEN J TIMM**

Claimant,

and

**TEAM STAFFING SOLUTIONS INC**

Employer.

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**HEARING NUMBER: 10B-UI-09988**

**EMPLOYMENT APPEAL BOARD  
DECISION**

**N O T I C E**

**THIS DECISION BECOMES FINAL** unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

**SECTION: 96.5-2-A**

**D E C I S I O N**

**UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE**

The claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

**FINDINGS OF FACT:**

The claimant, Steven J. Timm, was employed by Team Staffing Solutions, Inc. from September 18, 2009 through October 9, 2009. (Tr. 3, 6) At the start of his hire, the claimant informed Team Staffing that he only needed temporary work because he planned on attending the Southeast Georgia Linemen Training Center after December of 2009. (Tr. 4) Mr. Timm's last assignment was for full-time work with Muscatine Logistics (Client) as a forklift operator. (Tr. 3) He was hired by the account manager's representative, and not the account manager, herself, who usually did the hiring. (Tr. 3, 9) The claimant understood this to be the usual temporary assignment. (Tr. 9)

After being on this assignment for a while, the Client complimented Mr. Timm telling him that after about a month and half, he would be offered full-time permanent employment, as it was a temp-to-hire position. (Tr. 3-4, 6, 8) The claimant inquired if he could refuse because of his future plans to attend lineman to which the Client questioned his motivation. (Tr. 4) When Mr. Timm explained his rationale for not accepting the potential job offer to his supervisor, and that he wanted to continue this assignment through the December (Christmas Break) (Tr. 4, 11), he was directed to go home since it was a slow night. (Tr. 4) The Client also told him to wait for Team Staffing's call in the morning. (Tr. 4, 9)

The next morning (October 8, 2010), Mr. Timm did not hear from Team Staffing. He contacted them at 7:00 a.m. about his assignment with Muscatine (Tr. 4), but was told they had received no information from the Client. The employer told him to report to Muscatine Logistics as usual, unless he hears otherwise. (Tr. 4) While on his way to work that afternoon, he received a call from the Client telling him he needn't report because they were releasing him since he couldn't accept the full-time employment. (Tr. 4)

The Client reported to Team Staffing that Mr. Timm was a no call/no show on October 8, 2010, and they were ending his assignment. (Tr. 7, 8, 9, 11) The employer terminated the claimant for having numerous attendance issues and being a no call/no show with his last assignment. (Tr. 8) The claimant had never been disciplined for any attendance issues throughout his tenure with the temporary agency or on his assignment with Muscatine Logistics. (Tr. 9)

## **REASONING AND CONCLUSIONS OF LAW:**

Iowa Code Section 96.5(2)(a) (2009) provides:

*Discharge for Misconduct.* If the department finds the individual has been discharged for misconduct in connection with the individual's employment:

The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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 Iowa Supreme court has accepted this definition as reflecting the intent of the legislature. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665, (Iowa 2000) (quoting Reigelsberger v. Employment Appeal Board, 500 N.W.2d 64, 66 (Iowa 1993)).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 NW2d 661 (Iowa 2000).

The fact that the claimant either didn't know or misunderstood the nature of the Muscatine Logistics assignment (temporary or temp-to-hire) is not determinative of his eligibility for unemployment compensation. Rather, what matters is the nature of the claimant's separation from his employment. Although Team Staffing alleged that the claimant's termination was based on attendance issues (Tr. 8), the employer failed to produce any corroboration to substantiate their claim. (Tr. 9)

The claimant provided credible testimony that he informed the employer, upfront, of his need for temporary work based on his desire to go to lineman school after December. (Tr. 4, 11) Thus, his surprise when the Client raised the possibility of full-time permanent work was genuine. His good faith discussion with the Client that he wouldn't be able to accept an offer of permanent full-time work, in and of itself, was not misconduct, nor was it an intention to quit his assignment. Mr. Timm made it clear to the Client (and the employer) that he was available to work through December. (Tr. 10) When the claimant was immediately directed to go home purportedly due to lack of work, he complied with that directive. Instead of waiting for further instruction, he reasonably and in good faith contacted the employer for additional information regarding continued work with Muscatine Logistics or another assignment. (Tr. 4) The claimant was not a no call/no show, as he had been released from his assignment on October 8<sup>th</sup> and he had no reason to report to work at Muscatine Logistics.

871 IAC 24.32(4) provides:

*Report required.* The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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...

Assuming arguendo the claimant was a no call/no show, his alleged failure to report to work would have been an isolated instance of poor judgment. A single instance of unexcused absence is not misconduct where there are no prior problems with attendance. Sallis v. Employment Appeal Board, 437 N.W.2d 895 (Iowa 1989) Either way, the employer has failed to satisfy their burden of proof.

**DECISION:**

The administrative law judge's decision dated September 15, 2010 is **REVERSED**. The claimant was discharged for no disqualifying reason. Accordingly, he is allowed benefits provide he is otherwise eligible

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John A. Peno

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Elizabeth L. Seiser

AMG/fnv

**DISSENTING OPINION OF MONIQUE F. KUESTER:**

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

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Monique F. Kuester

AMG/fnv