

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**TYANIKKA L ROBINSON**  
Claimant

**APPEAL NO: 12A-UI-05266-DT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**NURSEFINDERS OF DES MOINES**  
Employer

**OC: 02/05/12**  
**Claimant: Appellant (2/R)**

Section 96.19-38-b – Eligibility for Partial Unemployment Insurance Benefits  
Section 96.5-1-j – Temporary Employment  
871 IAC 24.26(19) – Temporary Employment  
Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

Tyanikka L. Robinson (claimant) appealed a representative's April 12, 2012 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits in connection with her employment with Nursefinders of Des Moines (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 6, 2012. The claimant participated in the hearing. The employer's representative received the hearing notice and responded by sending a statement to the Appeals Section indicating that the employer was not going to participate in the hearing. Based on the evidence, the arguments of the claimant, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUES:**

Was the claimant employed by the employer for less than her usual hours and wages and eligible for full or partial unemployment insurance benefits? Was there a disqualifying separation from employment either through a voluntary quit without good cause attributable to the employer or through a discharge for misconduct? Did the claimant refuse a suitable offer of work without good cause? Was she able and available for work?

**FINDINGS OF FACT:**

The claimant started working for the employer on July 8, 2010. She worked full time (35 – 36 hours per week on average) as a certified nursing aide (CNA) in the employer's temporary medical staffing business. Her last day of work was February 19, 2012.

Starting in December 2011 the employer was not giving the claimant many assignments due to an incorrect report to the employer that the claimant could not work due to a wrist surgery; the claimant had not had a wrist surgery. Because of the reduced hours the employer was giving to the claimant, on or about March 12 the claimant visited an Agency office and was advised she could file a claim for unemployment insurance benefits and seek partial benefits for the weeks

she was earning less than her weekly benefit amount of \$315.00 plus \$15.00. The weekly benefit amount was based upon Agency records indicating that the claimant's average weekly wage from the employer during the high quarter of her base period was \$460.40. A claim was set up for her at that time; the representative who was assisting her backdated the claim to February 5, 2012 and entered continued weekly claims for the weeks between February 5 and March 12 reporting no wages being earned. In fact, during the benefit week ending February 11 the claimant had earned \$127.50, during the benefit week ending February 18 she had earned \$383.00, and during the benefit week ending February 25 she had earned \$180.00.

The claimant's work in January and February 2012 was all with a specific assisted living center. On February 17, while the claimant was already working a shift at the center, the employer called her about working a shift at a hospital; the claimant declined because she was already working a shift for the first client. Other than that occasion, the claimant did not decline any offers of work after February 5.

On February 17 the assisted living center offered the claimant direct employment, but the center did not want the claimant to inform the employer, as there would have been a fee due to the employer had the client directly hired away a person who had been working there through the employer on assignment. While at work on the assignment on February 18 the claimant informed the business client that she could not accept the employment that way as it was unfair to the employer. The claimant continued working on the assignment one day thereafter, February 19, and was scheduled to continue working there for other days thereafter, but on February 20 the employer called the claimant and told her that the client had requested that the claimant be taken off work at the center.

For many days after February 20 the claimant called in to check to see if there was other work available for her, but the person who was responsible for giving her assignments never called the claimant back. The claimant ultimately understood that the employer considered her employment ended.

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

The unemployment insurance law provides that a claimant is deemed partially unemployment insurance benefits if she is not employed at her usual hours and wages and earns less than her weekly benefit amount plus \$15.00 in other employment. Iowa Code § 96.19-38-b.

Beginning at least by about February 5, 2012, the employer was not providing the claimant with substantially the same employment as it had provided during her base period. Consequently, the claimant is qualified to receive partial unemployment insurance benefits upon the filing of her claim effective February 5, 2012, provided she was otherwise eligible. To be eligible for benefits for any particular week, the claimant must file a weekly claim for that week reporting her wages from all employers earned (not paid) for that week; the amount of her eligibility will then be determined pursuant to the formula set out by the statute. 871 IAC 24.52(8); Iowa Code § 96.3-3.

The essential question in this case is whether there was a disqualifying separation from employment; in this case, the issue becomes whether the employer or the business client ended the claimant's assignment and effectively discharged her for reasons establishing work-connected misconduct as defined by the unemployment insurance law. 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 § 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).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer or its business client for ending the claimant's assignment is the claimant's declining of direct employment with the client. The employer has not met its burden to show disqualifying misconduct. *Cosper*, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

With respect to any week in which unemployment insurance benefits are sought, in order to be eligible the claimant must be able to work, is available for work, and is earnestly and actively seeking work. Iowa Code § 96.4-3. To be found able to work, "[a]n individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood." *Sierra v. Employment Appeal Board*, 508 N.W.2d 719, 721 (Iowa 1993); *Geiken v. Lutheran Home for the Aged*, 468 N.W.2d 223 (Iowa 1991); 871 IAC 24.22(1). A claimant must remain available for work on the same basis as when her base period wages were accrued. 871 IAC 24.22(2)f. The employer's belief that the claimant was physically unable for work was erroneous. The claimant remained available for work on the same basis as she had previously been working. Benefits are allowed, if the claimant is otherwise eligible.

A related issue is whether the claimant had refused a suitable offer of work without good cause. Iowa Code § 96.5-3-a. However, a refusal is not disqualifying if the reason for the refusal is because the claimant is already working. 871 IAC 24.24(7). There has been no evidence of any other offers of work the claimant refused after February 5, 2012. 871 IAC 24.24(8). Benefits are allowed, if the claimant is otherwise eligible.

An issue as to whether the claimant's wages for the weeks ending February 11, February 18, and February 25 were underreported and whether the fact of those unreported wages could

affect her eligibility for those weeks arose during the course of the hearing. If benefits were paid to which the claimant was not entitled, those benefits would be considered overpaid and subject to recovery; this could be accomplished by offset against subsequent weeks for which the claimant would be deemed eligible. This issue was not included in the notice of hearing for this case, and the case will be remanded for an investigation and preliminary determination on that issue. 871 IAC 26.14(5).

**DECISION:**

The unemployment insurance decision dated April 12, 2012 (reference 01) is reversed. The claimant is eligible for partial unemployment insurance benefits beginning February 5, 2012. The claimant was effectively discharged by the employer but not for misconduct as of February 20, 2012. The claimant is able and available for work, and has not refused any suitable offer of work without good cause since February 5, 2012. Benefits are allowed, if the claimant is otherwise eligible. The matter is remanded to the Claims Section for investigation and determination of the underreported wage issue.

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Lynette A. F. Donner  
Administrative Law Judge

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Decision Dated and Mailed

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