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

Appeal Number: 05A-UI-12236-RT
OC: 10-30-05 R: 02
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.

JOHN H CURTIS
2470 SNYDER AVE
OSKALOOSA IA 52577

VOLT MANAGEMENT CORPORATION
C/O EMPLOYER'S UNITY INC
NOW TALX UC EXPRESS
PO BOX 749000
ARVADA CO 80006-9000

_____
(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, John H. Curtis, filed a timely appeal from an unemployment insurance decision dated December 1, 2005, reference 01, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held on December 20, 2005, with the claimant participating. Mary Riley, the claimant's sister, was available to testify for the claimant but not called because her testimony would have been repetitive and unnecessary. The employer, Volt Management Corporation, did not participate in the hearing because the employer did not call in a telephone number, either before the hearing or during the hearing, where any witnesses could be reached for the hearing, as instructed in the Notice of Appeal.

The employer is represented by Employer's Unity, Inc., now TALX UC eXpress, which is well aware of the need to call in a telephone number in advance of the hearing if the employer wants to participate in the hearing. Claimant's Exhibit A was admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department of unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, including Claimant's Exhibit A, the administrative law judge finds: The employer is a temporary employment agency. The claimant was employed by the employer and assigned to 3M from June or July of 2002 until he was discharged on October 31, 2005. The claimant had also been employed at 3M previously under a different temporary employment agency. On October 31, 2005, the employer called the claimant's sister and left a message for the claimant to call the employer. The claimant called the employer and was informed that he was not to report to work to 3M because he had been terminated because he had been absent for two days, the night of October 26 into the morning of October 27 and the night of October 27 into the morning of October 28. The claimant worked the night shift. He was also told that he was discharged because he did not work the weekend. On the night of October 27 into the morning of October 27 and on the night of October 27 into the morning of October 28, the claimant was absent for personal illness. He properly reported these absences to 3M. The claimant was informed that he needed to call 3M for absences and was not informed that he had to call the employer. Evidence of the claimant's calls to 3M appear at Claimant's Exhibit A which is the claimant's long distance telephone charges showing calls to 641-828-7000 which is the 3M telephone number. The claimant did not work the weekend of October 29 and 30, 2005, because he did not know he was supposed to. Before the claimant reported to work on October 31, 2005 he received a message from his sister to call the employer and then the claimant learned that he had been discharged. When the claimant spoke to the employer on October 31, 2005 he inquired about his discharge and was told to call the employer's representative, Cindy at 3M. He did so on November 2, 2005 but she was not there. The claimant then determined that he had been discharged. The claimant did not thereafter contact the employer because he was not aware that he was supposed to. The claimant did not have a prior attendance problem nor had he ever received any warnings or disciplines for his attendance.

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 96.5-2-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) provide:

> 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.

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.

The claimant credibly testified, and the administrative law judge concludes, that he was discharged on October 31, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been 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 disqualifying 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. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer did not participate in the hearing and provide sufficient evidence of deliberate acts or omissions on the part of the claimant constituting a material breach of his duties and/or evincing a willful or wanton disregard of an employer's interest and/or carelessness or negligence in such a degree of recurrence, any of which would establish disqualifying misconduct. The employer also did not provide sufficient evidence of absences not for reasonable cause or personal illness and not properly reported so as to establish excessive unexcused absenteeism and disqualifying misconduct.

The claimant credibly testified that he was told that he was discharged for being absent on two days, the evening of October 26 into the early morning of October 27 and the evening of October 27 into the early morning of October 28 and then missing work for the weekend. The claimant credibly testified that he was ill on the first two days and that he properly reported these absences to 3M, the assignee of the employer. This is shown at Claimant's Exhibit A. The claimant also credibly testified that he did not know he was to work that weekend and therefore failed to work that weekend. Accordingly, the administrative law judge concludes that these absences were for personal illness or reasonable cause and properly reported or no proper reporting was necessary and are not excessive unexcused absenteeism. The claimant credibly testified that he had no prior attendance problems and he had not received any warnings or disciplines for his attendance. Therefore, the administrative law judge concludes the claimant's absences were not excessive unexcused absenteeism and not disqualifying misconduct and, as a consequence, he is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant denial of unemployment insurance benefits and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes there is insufficient evidence here of substantial

misconduct on the part of the claimant to warrant his disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant provided he is otherwise eligible.

The administrative law judge notes that the employer here is a temporary employment agency. However, the administrative law judge concludes that Iowa Code section 96.5-1-j does not apply here. The employer was well aware of the claimant's discharge or his ultimate completion of assignment because the employer is the one who notified the claimant. Further, there is no evidence that the claimant was provided a document which he was required to read and sign providing a clear and concise explanation of the notification requirement in such Code section and the consequences of a failure to notify the employer and that such notification was separate from any contract of employment and that a signed copy was provided to the claimant. The claimant testified that he was not aware that he needed to contact the employer and seek reassignment.

DECISION:

The representative's decision of December 1, 2005, reference 01, is reversed. The claimant, John H. Curtis, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was discharged but not for disqualifying misconduct.

kkf/kjf