IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DION L WALKER
Claimant

MANPOWER INTERNATIONAL INC
MANPOWER TEMPORARY SERVICES
Employer

APPEAL NO. 09-UI-11782-JTT

ADMINISTRATIVE LAW JUDGE DECISION

Original Claim: 06/28/09
Claimant: Respondent (1)

Iowa Code Section 96.5(1)(j) – Separation From Temporary Employment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the August 6, 2009, reference 02, decision that allowed benefits. After due notice was issued, a hearing was held on September 1, 2009. Claimant Dion Walker did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Tammy Ames, On-Site Supervisor, represented the employer. Exhibit One was received into evidence.

ISSUE:

Whether the claimant's separation from the temporary employment agency was for good cause attributable to the employer.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Dion Walker most recently worked for the employer in a full-time work assignment that commenced May 11, 2009. On June 7, 2009, the client business and the employer ended the assignment due to attendance issues. The final absence that triggered the discharge from the assignment occurred on June 4, 2009, when Mr. Walker was absent due to illness and properly notified the employer.

The employer's witness did not have any contact with Mr. Walker during the course of the employment. Much of the employer's information about Mr. Walker's employment and separation from the employment is based on contact the employer had with the client business on July 21, 2009 about a separation that had occurred on June 7, 2009. The employer representative, Leo Patrick, who notified Mr. Walker of his discharge from the assignment, is no longer with the employer and did not testify. The employer witness knows not whether additional assignments were discussed at the time Mr. Patrick notified Mr. Walker of his discharge from the assignment.

The employer has an end-of-assignment notification policy that appears on the job application and in a manual. The employer provided a copy of the policy from the manual as an exhibit.

The policy in the exhibit does not mirror the language of Iowa Code section 96.5(1)(j) and was not provided to Mr. Walker as a separate stand-alone policy, as required by Iowa Code section 96.5(1)(j).

REASONING AND CONCLUSIONS OF LAW:

The evidence indicates that the employer discharged Mr. Walker from the assignment due to attendance.

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.

The employer has the burden of proof in a discharge 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).

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). The administrative law judge notes that the employer presented no testimony from persons with personal knowledge of Mr. Walker's employment or separation from the employment. The employer had contact with the client business as part of its response to Mr. Walker's claim for benefits, but did not present any testimony from the client business.

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's *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 weight of the evidence indicates that the final absence on June 4, 2009 was for illness properly reported to the employer. Accordingly, that absence would be an excused absence under the applicable unemployment insurance law. Because the final absence was excused, the evidence fails to establish a current act of misconduct and the discharge from the employment cannot serve as the basis for disqualifying Mr. Walker for unemployment insurance benefits. See 871 IAC 24.32(8).

The employer alleged additional no-call, no-show absences. The employer was unable to provide dates for those absences or any additional information. The evidence in the record is insufficient to establish any unexcused absences.

Mr. Walker was discharged from the assignment for no disqualifying reason. The discharge from the assignment would not prevent Mr. Walker from being eligible for unemployment insurance benefits.

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 weight of the evidence indicates that the employer's end-of-assignment notification policy did not comply with the requirements of Iowa Code section 96.5(1)(j). Accordingly, the employer cannot claim the benefit of that statute. Regardless, the evidence indicates that the employer was in direct contact with Mr. Walker for the purpose of notifying him that the assignment had ended. The evidence fails to indicate one way or another whether the employer had additional assignments available, whether the employer discussed additional assignments with Mr. Walker, or whether Mr. Walker expressed interests in additional assignments. Under the administrative rule, Mr. Walker's election not to seek further assignments through the employer would not disqualify him for unemployment insurance benefits.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Walker's separation from the temporary employment agency was for good cause attributable to the temporary employment agency. Mr. Walker is eligible for

benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Walker.

DECISION:

The Agency representative's August 6, 2009, reference 02, decision is affirmed. 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 for benefits paid to the claimant.

_____
James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

jet/kjw