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

CHRISTOPHER J HARTFIELD
1807 EASTERN DR S
CEDAR RAPIDS IA 52404

ADVANCE SERVICES INC
C/O TALX UCM SERVICES INC
PO BOX 66864
ST LOUIS MO 63166-6864

Appeal Number: 05A-UI-06812-RT
OC: 05/22/05 R: 03
Claimant: Respondent (1)

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.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct
Section 96.5-1 – Voluntary Quitting
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Advance Services, Inc., filed a timely appeal from an unemployment insurance decision dated June 20, 2005, reference 03, allowing unemployment insurance benefits to the claimant, Christopher J. Hartfield. After due notice was issued, a telephone hearing was held on July 19, 2005, with the claimant participating. Dan Shaver and Heather Hugh were available to testify for the claimant but not called because their testimony would have been repetitive and unnecessary. Tami Beltramea, Office Manager, participated in the hearing for the employer. Employer's Exhibit One was admitted into evidence. The administrative law judge takes official

notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The employer is a temporary employment agency. The claimant's most recent assignment began on September 8, 2004, with Reinhart Foods, first as a forklift driver and then, after a month, a lumper. As a lumper, the claimant's start times would change depending upon when trucks were leaving and varied from 11:30 p.m. to 8:00 a.m. The employer would call the claimant the day before and inform the claimant when his shift would start. Sometimes the claimant would be called at the last minute. The claimant did not satisfactorily complete his assignment. On January 31, 2005, the claimant was called at the last minute by Reinhart Foods to come to work, but he could not because the starter was out in the van in which he rode to work. The claimant did not notify the employer. Reinhart Foods called the employer's witness, Tami Beltremea, Office Manager, and informed her that Reinhart Foods was tired of the claimant's missing work and his attitude and was discharging him. Ms. Beltremea then called the claimant and told him that he no longer had a job with Reinhart Foods. The claimant asked for other assignments, and Ms. Beltremea told the claimant that the employer was not going to give him another job. The employer has a rule or policy, as shown at Employer's Exhibit One, that if an employee is going to be absent or tardy to the employee's assignment, the employee is to notify the employer, Advance Services, Inc., at least one hour before the start time, and in this case the claimant was also supposed to inform the assignee Reinhart Foods.

The claimant was also absent on November 26, 2004. The claimant did not call either the employer or the assignee, Reinhart Foods. Reinhart Foods called Ms. Beltremea and told her that the claimant was absent and if it happened again, they would discharge him. Ms. Beltremea called the claimant and asked why he had not notified Reinhart Foods. The claimant said that he had left a message for Reinhart Foods. The claimant gave no reason why he did not call the employer. At that time Ms. Beltremea gave the claimant an oral warning about his attendance. There were allegations of a third absence, but the claimant denied any such absence. The only warning the claimant received prior to his separation was the warning on November 26, 2004. Pursuant to his claim for unemployment insurance benefits filed effective May 22, 2005, the claimant has received unemployment insurance benefits in the amount of $2,864.00 as follows: $358.00 per week for eight weeks from benefit week ending May 28, 2005, to benefit week ending July 16, 2005.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.

2. Whether the claimant is overpaid unemployment insurance benefits. He is not.

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.
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> 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.

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).

871 IAC 24.32(7) provides:

> (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.

The first issue to be resolved is the character of the separation. The employer maintains that the claimant left his employment voluntarily when he was absent as a no-call/no-show on January 31, 2005, and, further, failed to notify the employer, a temporary employment firm, of the completion of his assignment and seek reassignment within three working days of the completion of his assignment. The claimant was notified of the obligation to notify the temporary employment firm and seek reassignment in writing, as shown at Employer's Exhibit One. The claimant maintains that he was discharged on January 31, 2005, when the employer's witness, Tami Beltremea, Office Manager, told the claimant that he was discharged from his assignment with Reinhart Foods and the employer was not going to give the claimant another job. The administrative law judge concludes that the employer has failed to demonstrate by a preponderance of the evidence that the claimant left his employment voluntarily. It is true that the claimant was absent on January 31, 2005, and that he failed to notify the employer. However, the claimant testified that he notified Reinhart Foods, and there is no evidence to the contrary. The administrative law judge is constrained to conclude that one absence, even if a no-call/no-show, does not establish a voluntary quit in the absence of other evidence. The administrative law judge further notes that the claimant's assignment with Reinhart Foods was completed on January 31, 2005, when he was informed by Ms. Beltremea that he was discharged from that assignment. The claimant testified that, at that time, he sought another assignment from Ms. Beltremea and Ms. Beltremea said that the employer would not give him another job. Ms. Beltremea was unsure as to the exact contents of this

conversation. Accordingly, the administrative law judge concludes that there is not a preponderance of the evidence that the claimant did not seek reassignment with the employer. Accordingly, the administrative law judge is constrained to conclude that the claimant did not leave his employment voluntarily, but was discharged by the telephone call from Ms. Beltremea on January 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. 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. Although it is a close question, 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, namely, excessive unexcused absenteeism.

The only reason for the claimant's discharge from his assignment with Reinhart Foods and from the employer, Advance Services, Inc., was his attendance. The evidence establishes that the claimant was absent on two occasions: January 31, 2005, and November 26, 2004. The claimant denies that he was absent on November 26, 2004, but the administrative law judge concludes that the claimant's denial was not credible in view of the testimony by Ms. Beltremea from the claimant's timecard. There was no reason given for the absence on November 26, 2004. The absence on January 31, 2005, was because of transportation problems. There is evidence that the claimant notified the assignee, Reinhart Foods, of both absences, but even the claimant conceded that he did not notify the employer, Advance Services, Inc. The claimant credibly testified that his hours changed significantly with short notice, and he might start anywhere from 11:30 p.m. to 8:00 a.m., and occasionally would be called at the last minute by the assignee, Reinhart Foods. This was the situation on January 31, 2005, when the claimant was unable to make it to work on short notice because of transportation problems; the starter in the van in which the claimant rode was not working. The administrative law judge concludes that this absence was for reasonable cause, but it was not properly reported; because the claimant did not call the employer, Advance Services, Inc., as required by the employer's policy, as shown at Employer's Exhibit One. The administrative law judge must conclude that the other absence on November 26, 2004, was not for reasonable cause or personal illness and also not properly reported. There were some allegations of yet a third absence, but there was no direct testimony as to that and the claimant denied any other absences. On the evidence here, the administrative law judge is constrained to conclude that the claimant only had two absences, one of which was not for reasonable cause and both of which were not properly reported. The evidence also establishes that the claimant only received one oral warning for his attendance, on November 26, 2004.

The issue really becomes whether the two absences noted above, coupled with only one oral warning, establish excessive unexcused absenteeism. The administrative law judge concludes, although it is a close question, that they do not. The term "excessive unexcused absenteeism" assumes more than one absence or tardy. In general, three unexcused absences or tardies are required to establish excessive unexcused absenteeism. See, for example, Clark v. Iowa Department of Job Service, 317 N.W.2d 517 (Iowa App. 1982). Here, the claimant only had two. The claimant also had an explanation for at least the reason for his absence on January 31, 2005. The claimant only had one oral warning. Under the evidence here, the administrative law judge is constrained to conclude that the claimant's absences were not

excessive unexcused absenteeism and not disqualifying misconduct and, as 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 a 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 that 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.

Iowa Code section 96.3-7 provides:

> 7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.
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> If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of $2,864.00 since separating from the employer herein on or about January 31, 2005, and filing for such benefits effective May 22, 2005. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of June 20, 2005, reference 03, is affirmed. The claimant, Christopher J. Hartfield, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was discharged, but not for disqualifying misconduct. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out his separation from the employer herein.

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