**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS**

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

**WALTER FORD**
Claimant

**JACOBSON STAFFING COMPANY LC**
Employer

**APPEAL NO. 12A-UI-03608-JTT**

**ADMINISTRATIVE LAW JUDGE DECISION**

**OC: 02/05/12**
**Claimant: Respondent (1)**

Iowa Code section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.26(19) – Fulfillment of the Contract of Hire

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the March 28, 2012, reference 03, decision that allowed benefits in connection with a January 30, 2012 separation. After due notice was issued, a hearing was held on April 26, 2012. Mr. Ford did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Roberta Shinbori, Operations Manager, represented the employer.

**ISSUES:**

Whether Mr. Ford was discharged from his assignment at Firstco for misconduct in connection with the employment.

Whether Mr. Ford's separation from Jacobson Staffing Company 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: The employer is a temporary employment agency. Walter Ford commenced employment with Jacobson Staffing Company in November 2011. At that time, the employer placed Mr. Ford in a full-time, temp-to-hire work assignment at Firstco in Davenport. Mr. Ford last performed work in the assignment on January 30, 2012. At that time, Firstco ended the assignment based on Mr. Ford's attendance.

Mr. Ford had been in a car accident on November 29, 2011 and missed several days of work while he recovered. Firstco did not want Mr. Ford to return to the work until he had recovered from the accident. Mr. Ford was off work for about a week at that point and then returned to the assignment. Firstco shut down operations during the week that ended December 31, 2011. After the holiday shut-down, Mr. Ford returned to the assignment and continued to work until January 30, 2012.

At some point in January, Mr. Ford had an additional absence. Jacobson Staffing does not know date or details about the absence. It was this final absence that prompted Firstco to end the assignment.

On January 30, 2012, Jacobson Staffing employee Julie Schrader notified Mr. Ford that he was discharged from the assignment.

On February 1, 2012, a Jacobson Staffing employee telephoned Mr. Ford's phone and left a message regarding a new assignment that Mr. Ford might be considered for. The call was not an actual offer of employment, only an inquiry regarding whether Mr. Ford might be interested in being considered for the assignment. Mr. Ford did not respond. The employer left similar messages for Mr. Ford on February 16 and 21, but did not hear back from Mr. Ford.

The employer has a written end-of-assignment notice policy. The policy obligated Mr. Ford to contact the employer within three working days of the end of an assignment. The policy is contained in an employee handbook that was provided to Mr. Ford at the start of the employment. The policy is also contained in a job assignment sheet. The employer had Mr. Ford sign his acknowledgement of both documents. Both documents contained several other policies aside from the end-of-assignment notice policy.

**REASONING AND CONCLUSIONS OF LAW:**

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 this 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).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

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).

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). Employers may not graft on additional requirements to what is an excused absence under the law. See Gaborit v. Employment Appeal Board, 743 N.W.2d 554 (Iowa Ct. App. 2007). For example, an employee's failure to provide a doctor's note in connection with an absence that was due to illness properly reported to the employer will not alter the fact that such an illness would be an excused absence under the law. Gaborit, 743 N.W.2d at 557.

The evidence indicates a discharge from the assignment at Firstco based on attendance concerns. The employer has present insufficient evidence, and insufficiently direct and satisfactory evidence, to establish a current act of misconduct. The evidence indicates only that at some point in January, Mr. Ford had an additional absence. The evidence does not establish with any specificity when the final absence actually occurred. In the absence of a current act of misconduct, the discharge from the assignment would not disqualify Mr. Ford for unemployment insurance benefits. Even if the evidence had established the date of the last absence, and established it as a current act, there is insufficient evidence to establish that the final absence was an unexcused absence under the applicable law. Even if there was sufficient evidence to establish that the final absence was an unexcused absence and was a current act, the evidence still would not indicate excessive unexcused absences. Mr. Ford was discharged from the assignment for no disqualifying reason.

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.
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> 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.

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:
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> (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 employer's end-of-assignment notice requirement did not comply with the requirements of Iowa Code section 96.5(1)(j) and, therefore, cannot be used as the basis for disqualifying Mr. Ford for unemployment insurance benefits. The employer failed to comply with the statutory requirement that the end-of-assignment notice policy be set forth as "a clear and concise explanation of the notification requirement and the consequences of a failure to notify" set forth on a separate document. Mr. Ford fulfilled his obligation to the employer on January 30, 2012, when he performed the work the employer had available for him in the Firstco assignment. Mr. Ford was not required to seek further assignments through Jacobson Staffing Company. Mr. Ford's January 30, 2012, separation from Jacobson Staffing was for good cause attributable to that company. Mr. Ford is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

**DECISION:**

The Agency representative's March 28, 2012, reference 03, decision is affirmed. The claimant was discharged from the work assignment on January 30, 2012 for no disqualifying reason. The claimant January 30, 2012 separation from the temporary employment agency was for good cause attributable to that employer. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

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James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

jet/pjs