IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

FRANK M SCOTT Claimant **L A LEASING INC** Employer	**APPEAL 17A-UI-07181-SC-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 03/12/17** **Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.5(1)J – Voluntary Quitting – Temporary Staffing Agency
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

L A Leasing, Inc. (employer) filed an appeal from the July 12, 2017, reference 06, unemployment insurance decision that allowed benefits based upon the determination Frank M. Scott (claimant) completed his job assignment and notified the employer within three days as required. The parties were properly notified about the hearing. A telephone hearing was held on August 2, 2017. The claimant did not respond to the hearing notice and did not participate. The employer participated through Unemployment Benefits Administrator, Colleen McGuinty and Branch Manager, Sandy Ford. No exhibits were offered or received.

ISSUES:

Did the claimant voluntarily leave the employment or assignment with good cause attributable to the employer or did the employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

Did the claimant quit by not reporting for additional work assignments within three business days of the end of the last assignment?

Has the claimant been overpaid unemployment insurance benefits and, if so, can the repayment of those benefits to the agency be waived?

Can charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a temporary employee beginning on April 15, 2016, and he completed the last assignment he worked at Tysons Supply on May 25, 2017.

On June 16, 2017, the claimant accepted another assignment with Fisher Group to begin on June 19, 2017. The claimant did not show up for the assignment and did not notify the employer he would not be at work. Later that afternoon, he spoke to Branch Manager Sandy Ford. The claimant explained his phone broke and he did not have a bus pass to get to work.

On June 22, 2017, the claimant contacted Ford about finding another assignment. He contacted her on two other occasions about finding a new assignment. Ford continued to search for assignments for the claimant.

On June 29, 2017, the claimant called Ford upset. He stated he had spoken to someone who had told him that he had voluntarily quit due to being a no-call/no-show and was no longer an employee. Ford explained the employer's policy was one no-call/no-show absence was considered a voluntary quit and the claimant had been a no-call/no-show on June 19, 2017. The claimant had one prior absence in May 2017. He notified the employer of his absence and stated it was due to transportation issues. The claimant had not received any warnings related to absenteeism during his employment.

The claimant filed his initial claim for benefits the week of March 12, 2017. The administrative record shows that the claimant has not received any unemployment benefits since reactivating his claim on June 11, 2017, as his claim is locked due to a prior separation. On April 12, 2017, an unemployment insurance decision, reference 01, was issued by Iowa Workforce Development finding that the claimant voluntarily quit employment with the employer on March 8, 2017 without good cause attributable to the employer. The claimant appealed and an administrative law judge in the Appeals Bureau affirmed the decision. The claimant then appealed to the Employment Appeal Board who affirmed the decision. It does not appear the claimant has yet requalified for benefits since that separation by earning ten times his weekly benefit amount in insured wages. The administrative record also establishes that the employer did participate in the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant did not voluntarily quit his assignment but was discharged for no disqualifying reason. Additionally, the claimant's separation from the temporary agency employer is not disqualifying. Benefits are allowed, once the claimant requalifies for benefits and provided he is otherwise eligible.

Iowa unemployment insurance law disqualifies claimants who voluntarily quit employment without good cause attributable to the employer or who are discharged for work-connected misconduct. Iowa Code §§ 96.5(1) and 96.5(2)a. The burden of proof rests with the employer to show that the claimant voluntarily left his employment. *Irving v. Emp't Appeal Bd.*, 883 N.W.2d 179 (Iowa 2016). A voluntary quitting of employment requires that an employee exercise a voluntary choice between remaining employed or terminating the employment relationship. *Wills v. Emp't Appeal Bd.*, 447 N.W.2d 137, 138 (Iowa 1989); *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438, 440 (Iowa Ct. App. 1992). It requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980). Where there is no expressed intention or act to sever the relationship, the case must be analyzed as a discharge from employment. *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992).

If an individual misses three days of work without notice to the employer and the employer has a policy stating such conduct will be considered job abandonment, the individual is presumed to voluntarily quit without good cause attributable to the employer. Iowa Admin. Code r. 871-

24.25(4). Since the claimant did not have three consecutive no-call/no-show absences as required by the rule in order to consider the separation job abandonment, the separation was a discharge and not a quit.

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating the claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). 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 Admin. Code r. 871-24.32(7) (emphasis added); see *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 190, n. 1 (Iowa 1984) holding "rule [2]4.32(7)…accurately states the law."

The requirements for a finding of misconduct based on absences are therefore twofold. First, the absences must be excessive. *Sallis v. Emp't Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins* at 192. Second, the absences must be unexcused. *Cosper* at 10. The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins* at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper* at 10. The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness, and an incident of tardiness is a limited absence. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins, supra.*

An employer's attendance policy is not dispositive of the issue of qualification for unemployment insurance benefits. Absences must be both excessive and unexcused to result in a finding of misconduct. The claimant had one unexcused absence in May related to transportation and another unexcused absence on June 19 when he was a no-call/no-show. However, two unexcused absences is not disqualifying since it does not meet the excessiveness standard. Additionally, as the employer had not previously warned the claimant about the issue leading to the separation, it has not met the burden of proof to establish that the claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Since the employer has not established misconduct with respect to the separation from the assignment, benefits are allowed on that basis.

The next question is whether the claimant's separation from the temporary agency employer is disqualifying.

Iowa Code section 96.5(1)j provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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. (1) 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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> (2) 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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> (3) For the purposes of this paragraph:
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> (a) "Temporary employee" means an individual who is employed by a temporary employment firm to provide services to clients to supplement their workforce during absences, seasonal workloads, temporary skill or labor market shortages, and for special assignments and projects.
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> (b) "Temporary employment firm" means a person engaged in the business of employing temporary employees.

Iowa Admin. Code r. 871-24.26(15) provides:

> Employee of temporary employment firm.
>
> a. The individual is a temporary employee of a temporary employment firm who notifies the temporary employment firm within three days of completion of an employment assignment and seeks reassignment under the contract of hire. The employee must be advised by the employer of the notification requirement in writing and receive a copy.
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> b. The individual shall be eligible for benefits under this subrule if the individual has good cause for not contacting the employer within three days and did notify the employer at the first reasonable opportunity.
>
> c. Good cause is a substantial and justifiable reason, excuse or cause such that a reasonable and prudent person, who desired to remain in the ranks of the employed,

would find to be adequate justification for not notifying the employer. Good cause would include the employer's going out of business; blinding snow storm; telephone lines down; employer closed for vacation; hospitalization of the claimant; and other substantial reasons.

d. Notification may be accomplished by going to the employer's place of business, telephoning the employer, faxing the employer, or any other currently acceptable means of communications. Working days means the normal days in which the employer is open for business.

The purpose of the statute is to provide notice to the temporary agency employer that the claimant is available for and seeking work at the end of the temporary assignment. Since the claimant contacted the employer within three working days of the notification of the end of the assignment, requested reassignment, and there was no work available, benefits are allowed, once he requalifies and provided he is otherwise eligible.

As benefits are allowed, the issue of overpayment is moot and charges to the employer's account after the June 2017 separation cannot be waived once the claimant requalifies for benefits from the March separation.

DECISION:

The July 12, 2017, reference 06, unemployment insurance decision is affirmed. The claimant was separated from employment for no disqualifying reason. Benefits are allowed, once he requalifies for benefits and provided he is otherwise eligible. If the claimant believes he has requalified for benefits since his March separation from the employer, he should notify his local office or customer service and present documentation of wages earned. As benefits are allowed, the issue of overpayment is moot and charges to the employer's account after the June 2017 separation cannot be waived, once the claimant requalifies for benefits from the March separation.

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Stephanie R. Callahan
Administrative Law Judge

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Decision Dated and Mailed

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