IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

EVEYETTE D HALL
Claimant

TEMPS NOW HEARTLAND LLC
Employer

APPEAL NO. 11A-UI-06786-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/11/10
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the May 5, 2011, reference 05, decision that allowed benefits in connection with a March 2, 2011 separation. After due notice was issued, a hearing was held on June 17, 2011. Claimant participated. Patricia Vaughn of Personnel Planners represented the employer and presented additional testimony through Shae Munson, Senior Recruiter for Heartland Division.

ISSUES:

Whether the claimant was discharged from her temporary employment assignment for misconduct.

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: The employer is a temporary employment agency. The employer has ceased operations in its Heartland division. Eveyette Hall started a full-time, temp-to-hire work assignment at Crown Group on January 6, 2011 and continued to work in the assignment until March 2, 1011, when Temps Now Heartland On-Site Supervisor Mary Burkett notified her that she was discharged from the assignment for attendance. Ms. Burkett told Ms. Hall that the client business had ended the assignment. Ms. Hall had received a written warning for attendance on January 24 and a verbal warning for attendance on February 2, when Ms. Burkett notified Ms. Hall that the client business had gone from an eight point attendance system to a five-point attendance system. The employer alleges a final absence on March 2, 2011. Ms. Hall worked her shift that day. The employer alleges additional absences on January 6, 7, 8, 16, 19, 24, 28, 29, and February 20. The absences on January 28 and 29 were due to illness properly reported and supported by a doctor's excuse. The alleged absence on January 19 concerns alleged tardiness. The alleged absence on February 20 concerned either an alleged incident of tardiness or some other absence. The employer witness lacks personal knowledge of the

alleged absences and provided testimony based on incomplete documentation generated by Ms. Burkett, who is no longer with the company.

When Ms. Burkett notified Ms. Hall that she was discharged from the assignment, Ms. Hall was upset with the news. Ms. Hall expressed interest in a new assignment, but Ms. Burkett advised there were none available at that time and that Ms. Hall should continue to contact the employer.

As part of the orientation materials the employer provided to Ms. Hall at the start of her employment, the employer had Ms. Hall sign a document regarding her need to make further ongoing contact with the employer after the end of an assignment.

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 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).

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).

The employer has failed to provide sufficient evidence, and sufficient direct and satisfactory evidence, to establish any unexcused absences, including the absence alleged on March 2, 2011. The employer witness relied upon incomplete documentation made by a staff member who is no longer with the employer. The employer had the ability to present more satisfactory and direct evidence, but failed to takes steps prior to the hearing so that that could occur. The evidence fails to establish misconduct in connection with the assignment that would disqualify Ms. Hall 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 employer presented insufficient evidence to establish that the employer had an end-of-assignment notice requirement that satisfied the statute. Accordingly, Ms. Hall's obligation to seek further employment through the temp agency ended at the time she completed the assignment at Crown Group on March 2, 2011. In any event, the weight of the evidence indicates that Ms. Hall immediately indicated her desire for a new assignment and her availability for a new assignment on March 2, 2011 at the time Ms. Burkett notified her that the assignment was ended.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Hall's March 2, 2011 separation from the temporary employment agency was for good cause attributable to the temporary employment agency. Ms. Hall is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Hall.

DECISION:

The Agency representative's May 5, 2011, reference 05, decision is affirmed. The claimant was discharged from a temporary work assignment on March 2, 2011 for no disqualifying reason. 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 she 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