IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DIANA N RAMON
Claimant

ADVANCE SERVICES INC
Employer

APPEAL NO. 12A-UI-08200-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/03/11
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 July 6, 2012, reference 08, decision that allowed benefits in connection with a June 12, 2012 separation. After due notice was issued, a hearing was held on August 6, 2012. Michael Payne, Unemployment Insurance Specialist, represented the employer. Exhibits One and Two were received into evidence.

Claimant Diana Ramon did not respond to the hearing notice instructions to provide a telephone number for the hearing and did participate. The Appeals Section initially mailed a hearing notice to Ms. Ramon on July 18, 2012 to advise her of a hearing at 1:00 p.m. on August 6, 2012. It was subsequently necessary to change the hearing time to 11:00 a.m. on August 6, 2012. On July 24, 2012, the Appeals Section mailed notice to the claimant of the new hearing time. On July 23, 2012, the Appeals Section mailed a copy of the Employer's Exhibits to Ms. Ramon. The Exhibits included a copy of the hearing notice.

ISSUE:

Whether the claimant's June 12, 2012 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. Diana Ramon commenced getting work through the employer in 2007. Ms. Ramon started her most recent work assignment through Advance Services, Inc., in February 2012. At that time, Ms. Ramon was placed in a full-time, temporary work assignment at Ag Leader Technology in Ames. Ms. Ramon's work hours were 7:30 a.m. to 3:30 p.m. The employer representative does not know what days of the week Ms. Ramon would have been scheduled to work. Ag Leader Technology ended the assignment on June 12, 2012 due to alleged attendance issues. Ag Leader Technology alleged to Advanced Services that Ms. Ramon had been a no-call/no-show on June 11. While Ag Leader Technology asserted there were earlier attendance issues, Ag Leader Technology did not provide Advance Services, Inc., with any information concerning the alleged earlier concerns and Advance Services, Inc., has no knowledge of the alleged prior attendance issues. Ms. Ramon signed a

job assignment sheet on February 15, 2012 that acknowledge her obligation to contact Ag Leader Technology and Advance Services if she needed to be absent from work. The written policy does not specify when the contact needed to be made.

The supervisor at Ag Leader Technology notified Ms. Ramon of the discharge from the assignment when Ms. Ramon appeared for work on January 12, 2012. There was no further contact between Ms. Ramon and Advance Services until June 29, 2012, when Ms. Ramon contacted Advance Services to ask why the employer was protesting her claim for unemployment insurance benefits.

On February 15, 2012, Advance Services had Ms. Ramon sign an "Assignment Policy" document. The document states as follows:

> I understand that I am an employee of Advance Services, Inc. Only Advance Services, Inc., or I can terminate my employment. When the assignment ends, I must report to Advance Services, Inc., for my next job assignment. If I do not complete the assignment, the Advance Services, Inc., can assume that I have voluntarily quit. When I am on an assignment, I will not schedule any personal appointments, job interviews, or make personal phone calls during my work hours. It is my obligation to contact Advance Services, Inc., within three working days after my assignment ends or I will be considered a voluntary quit. Failure to do so could affect my eligibility for unemployment insurance benefits.
>
> I have read this policy and understand the ramifications of my actions as stated in this policy. I received a copy of this policy for my records.

REASONING AND CONCLUSIONS OF LAW:

The first question is whether Ms. Ramon was discharged from the temporary employment work assignment for misconduct in connection with the assignment.

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 establishes a single unexcused absence on June 11, when Ms. Ramon was absent and failed to properly notify the employer or the client business. There is insufficient evidence in the record to establish additional unexcused absences. Ms. Ramon's single

unexcused absence would not constitute misconduct in connection with the work assignment. See Sallis v. Employment Appeal Board, 437 N.W.2d 895 (Iowa 1989). The discharge from the temporary work assignment was for no disqualifying reason.

The next question is whether Ms. Ramon's separation from the temporary employment agency was for good cause attributable to Advance Services.

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's written "Assignment Policy" fails to comply with the requirements of the statute, which requires a clear and concise statement of the three-day notice requirement set out as a stand-alone policy on a separate document. Rather than limit the text of Assignment Policy to comply with dictates of the statute, the employer elected to add multiple additional policy provisions in the same document. In the absence of employer compliance with the statutory notice requirement, the employer cannot claim the benefit of the statute to deny benefits to the claimant. Ms. Ramon fulfilled her contract of hire when she completed the assignment at Ag Leader Technology on June 12, 2012. She was under no further obligation under the law to contact Advance Services, Inc., and under no obligation under the law to seek additional work through the temporary employment firm.

Ms. Ramon's June 16, 2012 separation from the temporary employment agency was for good cause attributable to the temporary employment agency. Ms. Ramon is eligible for benefits provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Ramon.

DECISION:

The Agency representative's July 6, 2012, reference 08, decision is affirmed. The claimant's June 12, 2012 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.

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James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

jet/css