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

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

**BRITTANY R RISNER**
Claimant

**ADECCO USA INC**
Employer

**APPEAL NO. 12A-UI-07182-JTT**

**ADMINISTRATIVE LAW JUDGE DECISION**

**OC: 05/13/12**
**Claimant: Appellant (2)**

Section 96.6(4) – Previously Adjudicated Issue
Section 96.5(1)(j) – Separation from Temporary Employment

**STATEMENT OF THE CASE:**

Brittany Risner filed a timely appeal from the June 8, 2012, reference 02, decision that denied benefits in connection with a July 13, 2011 separation based on an agency conclusion that the matter had been previously adjudicated as part of an earlier claim. After due notice was issued, a hearing was held on July 11, 2012. Ms. Risner participated. Tom Kuiper of TALX represented the employer and presented testimony through Emily Case. The hearing in this matter was consolidated with the hearing in Appeal Number 12A-UI-07181-JTT. The administrative law judge took official notice of the materials submitted for and generated in connection with the fact-finding interview. Department Exhibits D-1, D-2, and D-3 are part of the fact-finding documents and were marked for identification purposes.

**ISSUES:**

Whether the claimant's July 13, 2011 separation was previously adjudicated and whether the prior adjudication continues to bind the parties.

Whether the claimant separated from the temporary employment agency for a reason that disqualifies her for unemployment insurance benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The employer is a temporary employment agency. On May 23, 2011, Brittany Risner started a temporary, part-time work assignment with the Girl Scouts. The hours of the employment were noon to 5:00 p.m., Monday through Friday. Ms. Risner last performed work in the assignment on Friday, July 8, 2011. Ms. Risner's supervisor in the assignment was Melissa Fischer, Girl Scouts office manager. Doug Bergman, Adecco branch manager, followed the assignment on behalf of the temporary employment agency. Ms. Risner was absent due to illness on July 11 and 12, 2011. Ms. Risner contacted both Ms. Fischer and Mr. Bergman prior to her shift on both days as required by the established work rules.

On the morning of July 13, 2011, Ms. Risner contacted Ms. Fischer and learned from Ms. Fischer that Ms. Fischer was ending the assignment due to Ms. Risner's absences. Ms. Risner immediately contacted Mr. Bergman to discuss that she had just been discharged from the assignment. Mr. Bergman was already aware of that. Ms. Risner did not request additional work from Adecco.

Adecco has an end-of-assignment notification policy that Adecco buried in a two-page, single-spaced Commitment Sheet that included at least 14 separate policy provisions. Numbered paragraph (i) states as follows: "Once an assignment is ended, I will contact the Adecco office I applied at regarding the reasons for the assignment's completion." Adecco also provided an end-of-assignment notification policy as part of a full-page, single-spaced Mandatory Contact Notice document that contained multiple policy provisions. The relevant policy stated as follows:

> I understand and agree that, upon conclusion of each assignment, I must immediately contact by telephone the Adecco representative listed below between the hours of 9AM and 5PM. I understand that such notification is for the purpose of determining eligibility and availability for additional work assignments as well as other administrative purposes. If the representative below is not available, I will ask to speak with a Staffing Consultant or the Branch Manager. I accept that:
>
> a. My failure to contact Adecco by phone within two business days* of completion of assignment may lead to the denial and/or interruption of unemployment benefits.
>
> b. If a suitable assignment is available with Adecco upon conclusion of my assignment and I fail to inquire about another assignment before filing for unemployment benefits, it may lead to an interruption and/or denial of unemployment benefits.
>
> c. If a suitable assignment is available with Adecco upon conclusion of my assignment and I refuse an offer of suitable work, it may lead to an interruption and/or denial of unemployment benefits.
>
> d. I will contact Adecco at least once a week when I am not on assignment with Adecco to verify my availability to work.

Two thirds down the single-spaced, tiny font page in an asterisk with following information *in an exceptionally small font:*

> *Exceptions to the two business day notification period are listed below:
> Iowa – Associates must contact Adecco within three working days of completion of the temporary assignment
>
> Michigan – Associates must contact Adecco within seven working days of completion of the temporary assignment.
>
> Minnesota – Associates must contact Adecco within five working days of completion of the temporary assignment

On June 8, 2012, a Workforce Development representative entered reference 10 decision that denied benefits based on the July 13, 2011 separation. The reference 10 decision was entered in connection with a claim year that started May 15, 2011. Also on June 8, 2012, a Workforce Development representative entered a reference 02 decision that denied benefits in connection with the same July 13, 2011 separation based on a conclusion that the separation had been

previously adjudicated as part of the prior year's claim. The reference 02 decision was entered in connection with a claim year that started May 13, 2012. The claimant filed a timely appeal from both decisions. The June 8, 2012, reference 10 decision was reversed on appeal. See Appeal Number 12A-UI-07181-JTT.

**REASONING AND CONCLUSIONS OF LAW:**

Unless appealed in a timely manner and reversed on appeal, a finding of fact or law, judgment, conclusion, or final order made pursuant to this section by an employee or representative of Iowa Workforce Development, administrative law judge, or the employment appeal board, is binding upon the parties in proceedings brought under this chapter. See Iowa Code section 96.6(3) and (4). In this case, the June 8, 2012, reference 10 decision, based on the May 15, 2011 original claim date, did not become a final agency decision and was reversed on appeal. Accordingly, the June 8, 2012, reference 10, decision does not bind the parties in this matter.

The administrative law judge must first consider whether Ms. Risner was discharged from the work assignment for misconduct.

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 employer failed to present sufficient evidence, and sufficiently directly and satisfactory evidence, to establish that Ms. Risner was discharged from the assignment for misconduct. The weight of the evidence indicates that the two final absences that triggered the discharge were due to illness and were properly reported both to Adecco and to the client business. The employer has failed to present sufficient evidence to establish otherwise. The administrative law judge notes that the employer had the ability to present testimony through Mr. Bergman and Ms. Fischer, but elected instead to present testimony from a witness with no personal knowledge of Ms. Risner's employment or separation from the employment. The discharge from the assignment did not disqualify Ms. Risner for unemployment insurance benefits.

The administrative law judge will next consider whether Ms. Risner's separation from Adecco was for good cause attributable to the Adecco.

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 weight of the evidence indicates that Ms. Risner was in immediate contact with Adecco once she learned that the assignment ended, but that she did not request an additional assignment.

The employer's end-of-assignment policy does *not* comply with the statutory requirement of a clear and concise statement set out as a stand-alone policy on a separate document. Both manifestations of the employer's policy are anything but clear and concise. With regard to the Commitment Statement, the employer has buried an erroneously stated two-day notice requirement amongst many policy statements on a one and half page, single-spaced, tiny font document. With regard to the Mandatory Contact Notice, the employer included an overly complex, misstatement of the statutory requirement in small font at the center of page, included additional unrelated policy statements, and then at the bottom of the page, in even smaller font, provided a statement of the Iowa three-day notification requirement. Both manifestations of the policy are clearly contrary to the clear, concise notice to claimants that the legislature intended through enactment of Iowa Code section 96.5(1)(j).

Because the employer's end-of-assignment notification requirement does not comply with the requirements of the statute, the employer cannot claim the benefit of the statute to deny the claimant benefits. Because the employer did not have a complying policy, Ms. Risner fulfilled the contract of hire, and her obligation to the employer ended when she completed the assignment at the Girl Scouts on July 13, 2011. Ms. Risner was under no obligation to make further contact with Adecco or seek further work through Adecco.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Risner's July 13, 2011 separation from the temporary employment agency was for good cause attributable to the temporary employment agency. Ms. Risner is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Risner.

**DECISION:**

The Agency representative's June 8, 2012, reference 02, decision is reversed. The prior adjudication in connection with the prior claim year did not become a final agency decision, was reversed on appeal, and does not bind the parties in this matter concerning the claim year that started May 13, 2012. The claimant's July 13, 2011 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