IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MOISES RODRIGUEZ JR
Claimant

ADVANCE SERVICES INC
Employer

APPEAL NO: 15A-UI-02615-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/08/15
Claimant: Appellant (2)

Section 96.5-1-j – Temporary Employment
871 IAC 24.26(15) – Temporary Employment

STATEMENT OF THE CASE:

Moises Rodriguez, Jr. (claimant) appealed a representative's February 23, 2015 (reference 04) decision that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment from Advance Services, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 31, 2015. The claimant participated in the hearing. The employer's representative received the hearing notice and responded by sending a statement to the Appeals Bureau indicating that the employer was not going to participate in the hearing. Based on the evidence, the arguments of the claimant, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was there a disqualifying separation from employment?

FINDINGS OF FACT:

The employer is a temporary staffing agency. After a prior period of employment with the employer, the claimant most recently began taking assignments through the employer on or about September 15, 2014. He worked on a harvest assignment for the employer's Ogden, Iowa business client, working on the dryers through the end of the harvest; and then was moved into another assignment with the same business client working in the warehouse at about the end of October 2014. His last day of work was on or about December 30, 2014. The assignment ended as of December 31 because the business client determined that the claimant's assignment was completed.

The claimant called in an absence on the morning December 31 because he needed to go to the hospital because of some lightheadedness. After he was seen by the doctor and given new medication, the doctor advised him that he needed to take a day or two off work to get used to the medication. He called back into the employer at about noon and told the employer's representative of this need to be off work for another couple days; the employer's representative initially responded that this would be fine. However, she called him back at about 3:00 p.m. and

told him that the business client had determined that his assignment was completed. He asked the representative if he could get another job and she told him that he would have to wait 90 days before he could be placed on another assignment. He tried to call the representative again on or about January 2 but the representative with whom he had previously spoken would not take his call, so he asked another representative in the employer's office if he could be placed on another assignment and she also told him he would have to wait 90 days.

There was some suggestion that the business client might have decided to end the claimant's assignment due to his attendance. Besides the absence on December 31, the claimant had missed two other days, both in December; one was due to his personal illness and one was due to needing to attend to a legal matter and also to attend to his son who was in the hospital. He had properly reported both of these prior absences.

The employer asserted that it was not participating in the hearing "due to judge bias." No facts were provided to support this allegation.

REASONING AND CONCLUSIONS OF LAW:

The essential question in this case is whether there was a disqualifying separation from employment.

The representative's decision had concluded that the claimant had "voluntarily quit your employment … when you failed to notify the temporary employment firm within three working days of the completion of your last work assignment." An employee of a temporary employment firm who has been given proper notice of the requirement can be deemed to have voluntarily quit his employment with the employer if he fails to contact the employer within three business days of the ending of the assignment in order to notify the employer of the ending of the assignment and to seek reassignment. Iowa Code § 96.5-1-j; Rule 871 IAC 24.26(15). The intent of the statute is to avoid situations where a temporary assignment has ended and the claimant is unemployed, but the employer is unaware that the claimant is not working could have been offered an available new assignment to avoid any liability for unemployment insurance benefits.

Here, the evidence establishes that claimant did seek additional work immediately upon being told on December 31 that the assignment was ended, and again on January 2. The claimant is not required by the statute to continue to maintain contact with the employer after this initial inquiry in order to remain "able and available" for work for purposes of unemployment insurance benefit eligibility. Regardless of whether the claimant continued to seek a new assignment, the separation itself is deemed to be completion of temporary assignment and not a voluntary leaving; a refusal of an offer of a new assignment would be a separate potentially disqualifying issue.

To the extent that it is suggested that the business client ended the claimant's assignment and effectively discharged him because of his attendance, the administrative law judge considers whether this separation was a discharge for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer or client was right or even had any other choice but to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate questions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for

reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. Rule 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. Rule 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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. Rule 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

Excessive unexcused absenteeism can constitute misconduct. Rule 871 IAC 24.32(7). A determination as to whether an absence is excused or unexcused does not rest solely on the interpretation or application of the employer's attendance policy. Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional, even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the absence under its attendance policy. Rule 871 IAC 24.32(7); *Cosper*, supra; *Gaborit v. Employment Appeal Board*, 734 N.W.2d 554 (Iowa App. 2007). Because the final absence was related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct and no disqualification is imposed. The employer has failed to meet its burden to establish misconduct. *Cosper*, supra. The claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

If a party believes that an administrative law judge has bias in a case, that party may seek to have the judge recuse himself or herself by filing an affidavit asserting bias and setting forth the basis for that assertion. Iowa Code § 17.17(8); Rule 871 IAC 26.7. The undersigned administrative law judge has no personal knowledge regarding this case; the only information used in reaching the conclusion is that information which has been presented during the course of the hearing, in this case, through the first-hand testimony of the claimant. The administrative law judge has no personal interest regarding either the claimant or the employer that could be affected by the outcome of this case, and has no personal sympathy toward or animus against either party. Rather, the administrative law judge only applies the applicable law and burden of proof to weigh the sufficiency of the evidence and to reach an appropriate legal conclusion. The employer has not provided any basis for its assertion of bias and has not established that there is either actual bias or a bona fide appearance of bias. The employer's assertion is without merit.

DECISION:

The representative's February 23, 2015 (reference 04) decision is reversed. The claimant's separation was not a voluntary quit but was the completion of a temporary assignment, perhaps unsuccessfully, but not due to misconduct. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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