

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

DESTINY A CARLSON
436 S 12TH
CLARINDA IA 51632

MANPOWER INTERNATIONAL INC
MANPOWER TEMPORARY SERVICES
C/O TALX UC EXPRESS
PO BOX 66864
ST LOUIS MO 63166-6864

Appeal Number: 05A-UI-05566-DT
OC: 05/09/04 R: 01
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge
Section 96.7-2-a(2) – Charges Against Employer's Account

STATEMENT OF THE CASE:

Manpower International, Inc. (employer) appealed a representative's May 19, 2005 decision (reference 02) that concluded Destiny A. Carlson (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 14, 2005. The claimant participated in the hearing. Todd Aschenfelter appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was there a disqualifying separation from employment? Is the employer's account subject to charge?

FINDINGS OF FACT:

The employer is a temporary employment firm. The claimant began taking assignments with the employer April 30, 1999. She did not have any assignments with the employer, however, during 2002 through 2005, until she began an assignment on April 1, 2005. She worked full time in the assignment from approximately 3:00 p.m. to 11:00 p.m. as an assembler. Her last day on the assignment was April 22, 2005. The assignment ended because the employer's business client determined to end it because of the claimant's attendance.

On April 22, 2005, the claimant was working but became ill, so she requested and received permission from her supervisor to leave early. The next day, Saturday, April 23, 2005, was scheduled for overtime. The claimant was still sick, so she called prior to the start of her shift. When she reached the guard shack and asked to be transferred to her supervisor, the personnel at the guard shack in fact transferred her to the voice mail of a different supervisor. The claimant proceeded to leave a message that she would not be in at work, figuring that there was a reason the guard shack had transferred her to that supervisor and that at least that supervisor would inform her supervisor. Later, after the scheduled start time for her shift, the claimant again attempted to reach her own supervisor. This time she was transferred to the correct supervisor, but again got a voice mail, and again left a message.

On April 25, 2005, the claimant went in to the worksite early because she wished to speak to the employer's on-site account manager about a discrepancy in her paychecks. When she arrived the account manager informed her that she was terminated. The claimant spoke with the supervisor to see about getting her job back, but was told that the business client was cutting back on production anyway, so she would not be brought back.

The employer did not establish that the claimant had been given any prior warnings regarding her attendance.

The claimant established an unemployment insurance benefit year effective May 9, 2004. She filed an additional claim effective April 24, 2005. She established a second claim year effective May 8, 2005.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the employer or the business client ended the claimant's assignment and effectively discharged her 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 section 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).

The focus of the definition of misconduct is on acts or omissions by a claimant that “rise to the level of being deliberate, intentional or culpable.” Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer’s interest, such as found in:
 - a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
 - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
 - a. Manifest equal culpability, wrongful intent or evil design; or
 - b. Show an intentional and substantial disregard of:
 1. The employer’s interest, or
 2. The employee’s duties and obligations to the employer.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

871 IAC 24.32(7) provides:

(7) Excessive unexcused absenteeism. 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.

The reason the employer was forced to discharge the claimant from her assignment was her attendance. In order to be misconduct, absenteeism must be both excessive and unexcused. The record does not establish that the claimant's absences were both excessive and unexcused. The employer has failed to meet its burden to establish misconduct. Cosper, supra. The claimant's absences do not establish her actions were misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

The final issue is whether the employer's account is subject to charge. An employer's account is only chargeable if the employer is a base period employer. Iowa Code section 96.7. The base period is "the period beginning with the first day of the five completed calendar quarters immediately preceding the first day of an individual's benefit year and ending with the last day of the next to the last completed calendar quarter immediately preceding the date on which the individual filed a valid claim." Iowa Code section 96.19-3. The claimant's base period for her May 9, 2004 claim year began January 1, 2003 and ended December 31, 2003. The claimant's base period for her May 8, 2005 claim year began January 1, 2004 and ended December 31, 2004. The employer did not employ the claimant during this time, and therefore the employer is not currently a base period employer and its account is not currently chargeable for benefits paid to the claimant.

DECISION:

The representative's May 19, 2005 decision (reference 02) is affirmed. The employer discharged the claimant, but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible. The employer's account is not subject to charge in the current benefit year.

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