BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

LANA J DOTY	:	
	:	HEARING NUMBER: 07B-UI-09705
Claimant,	:	
	:	
and	:	EMPLOYMENT APPEAL BOARD
	:	DECISION
TEAM STAFFING SOLUTIONS INC	:	
Employer.		

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-1

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

The claimant appealed this case to the Employment Appeal Board. All members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds the administrative law judge's decision is correct. The administrative law judge's Findings of Fact are adopted by the Board as its own. The administrative law judge's decision is **AFFIRMED**.

SEPARATE CONCURRING OPINION OF MARY ANN SPICER:

In addition to adopting the Administrative Law Judge's findings of fact I would also adopt her conclusions of law. In my opinion termination of an assignment under the conditions that satisfy Iowa Code §95.1(1)(quitting) or Iowa Code §96.5(2)(discharge) should disqualify a claimant working for a temporary employment agency notwithstanding eligibility for reassignment.

The claimant did call in two days prior to discharge for personal reasons. The employer discharged the claimant based on her absences within a two-week period of hire, which was deemed excessive for a new hire temporary. To ensure that future decisions carry more weight for the Temporary Employer, the Temporary Employer may wish to review their policy to make sure that the employee understands

whom

they should call when there is an anticipated absence or a quit as well as continuing to provide them a copy of the consequences if they do not call within three days after completing a job assignment to seek further reassignment. The Temporary Staffing Agency should also make sure that the client understands the process as it relates to call in by the temporary employee to hire or future cases could be subject to go the way of the claimant granting benefits due to IAC 871-24.26(15) (a) & (96) technicalities.

Mary Ann Spicer

RRA/fnv

SEPARATE CONCURRING OPINION OF ELIZABETH L. SEISER:

I write separately to explain the basis of my decision to affirm. The difficulty posed in this case is the tension between two facts: (1) the Claimant remains employed by her actual employer despite her removal from an assignment and (2) the Claimant nevertheless was placed on unpaid status because of something she did.

I start with first principles. An unemployed person who meets the eligibility requirements of Iowa Code §98.4 receives benefits. Only if they fall within an exception to this general rule, as set out in Iowa Code §96.5, are they disqualified. The Code provides that people who are "totally unemployed" may, assuming all conditions are satisfied, receive a level of benefits equal to their, somewhat cryptically calculated, "weekly benefit amount." Iowa Code §96.3(2). "An individual shall be deemed 'totally unemployed' in any week with respect to which no wages are payable to the individual and during which the individual performs no services." Iowa Code §96.19(38(a). What this means, of course, is that an individual need not be separated from employment to be eligible for benefits as totally unemployed.

Meanwhile, if a person is separated from employment then the nature of the separation may disqualify them for benefits under Iowa Code §96.5(1) or §95.5(2). These subsections provide for disqualification for certain kinds of quits and discharges from employment. By law a discharge is form of "termination of employment initiated by the employer". 871 IAC 24.1(113)(c). On the other hand, a quit is a specie of "termination of employment initiated by the employee." 871 IAC 24.1(113)(b); see also FDL Foods, Inc. v. Employment Appeal Board, 460 N.W.2d 885, 887 (Iowa App. 1990)("quitting requires an intention to terminate employment…"); Peck v. Employment Appeal Board, 492 N.W.2d 438 (Iowa App. 1992)(same). This is but a long way of stating the obvious: both discharges and quits require a termination of the employment relationship. If an employee remains employed then the employee has neither quit nor been discharged. If an employee is not discharged the employee cannot be disqualified under §96.5(2) for being discharged for misconduct. If an employee has not quit the employee cannot be disqualified under §96.5(1) for having quit without good cause attributable to the employment. Thus where the employment relationship continues, that is, where no separation of employment has occurred, then ordinarily disqualification cannot be imposed.

Yet, a person who is on unpaid status, but still considered an employee, may receive benefits. The most obvious example is layoff for lack of work. If I were to hold that no disqualification may be imposed barring a termination of employment then there would be no reason to worry about why a layoff occurs – only that it has. But what if the person is on unpaid status for a reason other than lack of work? What if an employee commits misconduct and then is placed on unpaid layoff or suspension as a disciplinary measure? Such an employee is unemployed but not "unemployed through no fault of their own." Iowa Code §96.2. The Employment Security Law seeks to encourage "employers to provide more stable employment." Iowa Code §96.2. In White v. Employment Appeal Board 487 N.W.2d 342 (Iowa 1992) the Court sought to "strike a proper balance between the underlying policy of the Iowa Employment Security Law, which is to provide benefits for 'persons unemployed through no fault of their own,' Iowa Code Sec. 96.2, and fundamental fairness to the employer, who must ultimately shoulder the financial burden of any benefits paid. See Iowa Code Sec. 96.7." White at 345. I also would interpret the law so as to strike this balance.

Workforce has by rule provided some guidance on disciplinary layoffs:

> 24.32(4) … In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved
> …
> 24.32(9) Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

871 IAC 24.32.

Similarly Workforce has rules on voluntary periods of unemployment while still not separated:

> j. Leave of absence. A leave of absence negotiated with the consent of both parties, employer and employee, is deemed a period of voluntary unemployment for the employee–individual, and the individual is considered ineligible for benefits for the period.
>
> (1) If at the end of a period or term of negotiated leave of absence the employer fails to reemploy the employee–individual, the individual is considered laid off and eligible for benefits.
> (2) If the employee–individual fails to return at the end of the leave of absence and subsequently becomes unemployed the individual is considered as having voluntarily quit and therefore is ineligible for benefits.
> (3) The period or term of a leave of absence may be extended, but only if there is evidence that both parties have voluntarily agreed.
>
> (Iowa Administrative Code 871–24.22(2).)

… .

> Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.
>
> 24.23(10) The claimant requested and was granted a leave of absence, such period is deemed to be a period of voluntary unemployment and shall be considered ineligible for benefits for such period.
>
> Iowa Administrative Code 871–24.23(10).

Looking then to the regular employer situation I may gain insight into the question of temporary employment. For a single employer if an employee commits misconduct and then is disciplined with a suspension/layoff that employee would be "unemployed" and could meet the requirement of Code §96.4. But Workforce does not leave the matter at that, and instead, instructs that a disciplinary suspension is considered a discharge and the issue of misconduct is to be resolved. This rule balances the interests involved. If the claimant does not commit misconduct they get benefits. This protects workers against the ravages of involuntary unemployment. But if they do commit misconduct they are disqualified. This discourages misconduct and prevents people from being able to qualify themselves for benefits through intentional or reckless conduct. Finally, the mere fact of continued employment status does not prevent possible disqualification for misconduct. This means employers are not punished for being lenient and workers are less likely to get fired – which promotes the goals of the reducing unemployment.

I see no reason not to apply this approach to the ending of assignments from temporary employers. An employee who is forcibly removed from an assignment in reaction to something they did is effectively placed on unpaid status as a disciplinary measure. This is a "disciplinary layoff or suspension imposed by the employer" as contemplated by 24.32(9). I therefore will treat the disciplinary ending of an assignment as a discharge and resolve the issue of misconduct as provided for in rule 24.32(4) and 24.32(9). Claimants removed from an assignment for misconduct will be disqualified as with any other discharge for misconduct and Claimants removed but not for misconduct will not be disqualified.

All that remains is what to do when a claimant quits an assignment but remains eligible for reassignment. To my mind this is not a quit since the Claimant remains employed by the temporary employer. (This assumes the Claimant satisfies the conditions of §96.5(1)(j). If the Claimant does not then that paragraph deems it to be a quit if the Employer has satisfied its obligations under paragraph j.) I would hold that where a Claimant requests the end of an assignment the Claimant is asking for and being granted a leave of absence and will be deemed not able and available during the ensuing period of unavailability. Iowa Administrative Code 871–24.22(2); 24.23(10). This assumes that the Claimant does not commit misconduct in quitting the assignment. A Claimant who is forced off an assignment because the claimant simply refuses to do assigned work, or is repeatedly no-call/no-show, is actually being removed for misconduct, in which case I would look to the issue of disqualification for misconduct. But if the Claimant simply states that she quits, stops coming in to the assignment, timely notifies the temporary employer of this, requests reassignment, and remains employed by the temporary employment firm then I would find the ensuing period of unemployment to be merely a period of unavailability and would not impose a disqualification.

In summary, this is how I would handle the ending of assignments at temporary employers where the claimant remains continuously in the employ of the temporary employment agency:

1. If the assignment ends as scheduled then the provisions of Iowa Code §96.5(1)(j) apply.
2. If the claimant is involuntarily removed from the assignment based on something the claimant is alleged to have done then this is a disciplinary suspension that is "considered as discharge[e], and the issue of misconduct shall be resolved." 871 IAC 24.32(4)
3. If the assignment ends because the claimant walks off the assignment, commits no call/no show, refuses to do assigned work or does something in this vein then I would treat this not as a quit, nor as a voluntary leave of absence but as a disciplinary suspension as discussed in the above paragraph.
4. The previous paragraph is qualified in that if a claimant ceases coming to an assignment and does not notify the temp agency of this within three days the claimant would thereby fails to meet the requirements of §96.5(1)(j). In such an instance the claimant would be deemed to have quit under §96.5(1)(j).
5. If the claimant asks to be removed from the assignment, or quits with notice to the temp agency, then I would find the resulting period of unemployment to be a voluntary leave of absence and find the claimant ineligible (but not disqualified) during this period.

In the case at bar the Claimant's assignment with Schenker falls under paragraph 4. She stopped coming into the assignment but did not notify the Employer within three days. (Tran at p. 4-5; p. 8). She therefore was properly deemed to have quit without good cause under Iowa Code §96.5(1)(j). In the alternative, even disregarding the §96.5(1)(j) requirement, the Claimant would still be properly disqualified for misconduct (failing to report without notice) and being placed on disciplinary suspension. Meanwhile as to the Fabricators Plus assignment I would find the removal from the assignment to be an involuntary disciplinary suspension and thus the situation requires that misconduct be addressed. 871 IAC 24.32(4). On the issue of misconduct, I agree with the Administrative Law Judge that no misconduct was proved on the Fabricators Plus assignment, and would adopt her Conclusions of Law of this point.

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Elizabeth L. Seiser

RRA/fnv

DISSENTING OPINION OF JOHN A. PENO:

I respectfully dissent from the majority decision of the Employment Appeal Board. After careful review of the record, I would reverse the decision of the administrative law judge.

I agree with much of what Member Seiser says on this subject, but disagree that the ending of an assignment can ever be disqualifying where the employee remains employed. A quit requires a termination of employment and so does a discharge. If there is no termination of employment, and here the Claimant remains employed by the Employer, then there can be no quit, there can be no discharge. Since the Claimant has not quit she cannot be disqualified under Iowa Code §96.5(1) for quitting without good cause attributable to the Employer. Since the Claimant has not been discharged she cannot be disqualified under Iowa Code §96.5(2) for being discharged for misconduct. In short, no disqualification can be imposed and the Claimant should receive benefits. The problem with a contrary approach is highlighted in this case. Here the Claimant is expected to earn qualifying wages by working for the same employer against whom she claims benefits. This strikes me as bizarre, and contrary to the system contemplated by the Code. I would reverse and find that the Claimant continues to be employed and requires no additional earning to collect benefits.

John A. Peno

RRA/fnv