

the bindery that same evening, the claimant became ill and requested to go home, which his supervisor

allowed. (Tr. 11-12, 13, Exhibit 1-A) The next day, RR Donnelly contacted the employer to request that Mr. Summers be removed from the assignment. (Tr. 4, 5, 8, 16, Exhibit 1-A) The reason given, inter alia, was that “[Mr. Summers was] not capable of working in our bindery and pick & pack areas. He worked out well in tabbing, but we no longer have any of that type of work...” Teresa Cahill (the claimant’s RR Donnelly supervisor) (Tr. 6) also learned that the claimant had logged in two more hours than he had actually worked the previous night. (Tr. 3-4, 5, 15, Exhibit 1-B)

The claimant did not know that he was discharged from RR Donnelly; rather, Dave Blazek, the second shift supervisor at Donnelly, told him he was laid off. (Tr. 10, 17-18) Temps Now would have offered Mr. Summers another assignment; however, “[the employer] didn’t have anything available at that time.” (Tr. 7-8)

REASONING AND CONCLUSIONS OF LAW:

Was the claimant discharged from the RR Donnelly job assignment, and consequently disqualified for benefits?

Iowa Code Section 96.5(2)(a) (2007) provides:

Discharge for Misconduct. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:

The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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 Iowa Supreme court has accepted this definition as reflecting the intent of the legislature. Lee v.

Employment Appeal Board, 616 N.W.2d 661, 665, (Iowa 2000) (quoting Reigelsberger v. Employment Appeal Board, 500 N.W.2d 64, 66 (Iowa 1993)).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 NW2d 661 (Iowa 2000).

The record establishes that the claimant's job assignment at RR Donnelly ended on February 12th, in part, for reasons that he was, basically, incapable of adequately performing his job duties in the bindery and pick & pack departments. (Tr. Exhibit 1-A) The court in Richers v. Iowa Department of Job Service, 479 N.W.2d 308 (Iowa 1991) held that inability or incapacity to perform well is not volitional and thus, cannot be deemed misconduct. According to the claimant's unrefuted testimony, however, he was "... laid off due to lack of work." (Tr. 18) The employer's Exhibit 1-A is somewhat corroborative of the claimant's belief he was laid off based on the language Ms. Cahill used when she indicated that the claimant ... worked... well in tabbing, but we no longer have any of that type of work..." (Exhibit 1-A) Thus, when the claimant testified that David Blazek laid him off, his testimony is not without credibility. 871 IAC 24.1(113) provides that a "... . A layoff is a suspension from pay status initiated by the employer without prejudice to the worker for such reasons as: lack of orders..." In that case, if the claimant's separation from his assignment was, in fact, a layoff, it would not be a disqualifying event.

On the other hand, Temp Now argues that RR Donnelly terminated Mr. Summers for falsifying his timecard, which the claimant denies he was ever told. He admits that he left early and that he was granted permission to do so that was not disputed. There is nothing in the employer's exhibits from RR Donnelly that indicates that the claimant was discharged because of his time card except the notations added on Exhibit 1-B. The employer failed to provide any witnesses from RR Donnelly or Ms. Kennedy who spoke with RR Donnelly (whom was still within their employ) to dispute Mr. Summers' layoff' argument.

Was the claimant separated from Temp Now?

871 IAC 24.1(113) provides:

Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.

- a. *Layoffs.* A layoff is a suspension from pay status initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory-taking, introduction of laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.

b. Quits. A quit is a termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces.

- c. *Discharge.* A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.

The fact that Mr. Summers' RR Donnelly assignment ended is not probative that his employment relationship ended with Temp Now as well. According to the employer's own testimony, the claimant would have 'absolutely' (Tr. 8) been reassigned if he had called and requested the same. However, the employer's implication that Mr. Summers failed to call pursuant to the employer's 'weekly call' policy (Tr. 7, 8), and is presumably a quit, is without merit.

Iowa Code section 96.5-1-j provides:

An individual shall be disqualified for benefits: *Voluntary quitting.* If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

* * *

- 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 consequence 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. (Emphasis added.)

The employer admitted it had no such notification policy in writing (or otherwise) (Tr. 7), and separate from the claimant's contract of employment for which Mr. Summers signed, in accordance with the aforementioned statute. In addition, Mr. Summers had no reason to call the employer after completion of his assignment because both parties were immediately aware of his separation. According to the employer's own testimony, the latter had knowledge of the claimant's availability for future assignment, but admitted that the claimant was not offered a subsequent assignment because there was no work available (Tr. 7). In conclusion, substantial evidence supports that Mr. Summers continues to be employed with Temp Now, but as of February 12th, 2009, he was laid off due to lack of work orders.

See, 871 IAC 24.1(113), *supra*.

DECISION:

The administrative law judge's decision dated January 21, 2009 is **REVERSED**. The claimant was laid off from his current employment and is allowed benefits provided he is otherwise eligible.

John A. Peno

Elizabeth L. Seiser

AMG/fnv

DISSENTING OPINION OF MONIQUE F. KUESTER:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

Monique F. Kuester

AMG/fnv