

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRENDA GONZALEZ
Claimant

APPEAL NO. 07A-UI-02152-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MANPOWER INC
MANPOWER TEMPORARY SERVICES
Employer

OC: 01/28/07 R: 02
Claimant: Appellant (2)

Iowa Code section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absences
Iowa Code section 96.5(1)(j) – Separation From Temporary Employment Agency

STATEMENT OF THE CASE:

Brenda Gonzalez filed a timely appeal from the February 23, 2007, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on March 19, 2007. Ms. Gonzalez participated. Cindy Lunning, Staffing Specialist, represented the employer. The hearing was consolidated with the hearing in appeal number 07A-UI-02153-JTT.

ISSUES:

Whether the claimant was discharged from her final assignment for misconduct that disqualifies her for unemployment insurance benefits.

Whether the claimant's separation from the temporary employment agency was for good cause attributable to the employer.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Brenda Gonzalez commenced her most recent period of employment with Manpower Temporary Services on March 20, 2006. Manpower assigned Ms. Gonzalez to full-time packaging work at Fox River Mills. On August 7, 2006, a Fox River Mills representative contacted Manpower representative Erica Marillo and requested that Ms. Gonzalez be removed from the assignment due to attendance issues. Manpower records indicate that the absence that prompted the request to remove Ms. Gonzales occurred on August 6. However, Manpower is unable to provide any additional information regarding the absence. On August 7, Ms. Marillo contacted Ms. Gonzalez in response to the contact from Fox River Mills Packaging and told her that Fox River Mills had ended the assignment. Manpower did not have a new assignment for Ms. Gonzalez at that time. Ms. Gonzales had ceased reporting to the assignment because a Fox River Mills supervisor had notified her that she was being discharged for slow production.

Ms. Marillo is currently employed with a Manpower branch outside Iowa and did not testify. Employer representative Cindy Lunning was on vacation at the time Ms. Gonzalez's assignment at Fox River Mills ended. Ms. Lunning did not consult with Ms. Marillo in preparing for the unemployment insurance hearing.

Manpower had had Ms. Gonzalez sign a policy that obligated her to contact Manpower within five days of completion of an assignment to request a new assignment. The acknowledgment form for this notification requirement was separate from the handbook acknowledgment form. The acknowledgement form cited non-Iowa unemployment insurance law and indicated that the policy was in compliance with that non-Iowa law. Manpower's handbook set forth different notification requirements.

REASONING AND CONCLUSIONS OF LAW:

The administrative law judge will first consider the claimant's discharge from the assignment at Fox River Mills and whether that discharge was for misconduct that disqualifies Ms. Gonzalez for benefits.

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).

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).

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 Ms. Gonzalez's absences to constitute misconduct that would disqualify her from receiving unemployment insurance benefits, the evidence must establish that her *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). A single unexcused absence does not constitute misconduct. See Sallis v. EAB, 437 N.W.2d 895 (Iowa 1989).

The evidence in the record in the record fails to establish a single unexcused absence. The evidence indicates instead that Fox River Mills discharged Ms. Gonzalez because she was not working fast enough to suit Fox River Mills management. This failure to perform work at a satisfactory rate does not constitute misconduct that would disqualify Ms. Gonzalez for unemployment insurance benefits. See 871 IAC 24.32(1)(a). Accordingly, Ms. Gonzalez was discharged from the assignment for no disqualifying reason and would be eligible for unemployment benefits, provided she was otherwise eligible.

The administrative law judge will next consider whether Ms. Gonzalez separation from Manpower Temporary Services was for good cause attributable to the temporary employment agency.

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 greater weight of the evidence indicates that the employer's end-of-assignment notification policy did not satisfy the requirements of Iowa Code section 96.5(1)(j). At the hearing, Ms. Lunning referenced a policy that referenced a five-day notice requirement and cited an unemployment insurance statute or rule that was clearly not an Iowa unemployment insurance statute or rule. Because the policy did not comply with Iowa Code section 96.5(1)(j), any intentional or de facto election on the part of Ms. Gonzalez not to pursue a new assignment would not disqualify Ms. Gonzalez from receiving unemployment insurance benefits.

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

DECISION:

The Agency representative's February 23, 2007, reference 01, decision is reversed. The claimant was discharged from her temporary employment assignment for no disqualifying reason. The claimant's 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/pjs