IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

SETH R MORROW
Claimant

DES STAFFING SERVICES INC
Employer

APPEAL NO. 06A-UI-11144-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/01/06 R: 02
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

DES Staffing Services, Inc. (employer) appealed a representative's November 15, 2006 decision (reference 04) that concluded Seth R. Morrow (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 December 5, 2006. The claimant participated in the hearing. Kathy Anderson appeared on the employer's behalf and presented testimony from one other witness, Amanda McClure. 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.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The employer is a temporary employment firm. The claimant's first and only assignment began on May 9, 2006. He worked full time as a production worker for the employer's Ames, Iowa business client; since approximately August 2006 his schedule was from 8:30 p.m. to 7:00 a.m., beginning Sunday night and ending Friday morning. His last day on the assignment was the shift that ended at 7:00 a.m., September 29, 2006. The assignment ended because the employer's business client determined to end it because of the claimant's attendance.

The claimant was absent from work on the assignment September 17 through September 21 due to having kidney stones; he was again absent on September 26 for a follow up medical test. The claimant had called his immediate supervisor on the assignment each of those days to report he would not be at work, but had not contacted the business client's human resources department or the employer's office. On September 29, when the claimant came into the employer's offices to pick up his check, he was verbally reminded that if he was going to be absent he should call into the employer as well as to the business client.

On Sunday, October 1, the claimant was in Belle Plaine, Iowa, where he had been visiting a relative. At approximately 6:00 p.m. the claimant was driving to a gas station to fill with gas

before starting back to Ames, about a 100-mile trip, for his 8:30 p.m. shift start, when the motor mount broke off his vehicle, rendering it undrivable. He arranged for a cousin to come from Cedar Rapids, about 45 miles from Belle Plaine, to get him and take him to Ames. At approximately 7:15 p.m. he called his supervisor and reported the situation, indicating that he would be late. The cousin did not show up to pick up the claimant. He attempted to find other transportation back to Ames that night but was unsuccessful; at approximately 1:00 a.m. he called his supervisor back and filled him in on the situation. The supervisor responded that if the claimant could not get there by 2:00 a.m., which was then physically impossible, he did not need to bother coming at all.

The claimant testified that he did call the employer's office at approximately 7:15 p.m. right after talking to the supervisor and that he left a message reporting that he would be late. He thought he might have left the message on Ms. McClure's phone, but was not sure; Ms. McClure testified she did not receive a message from the claimant. The claimant acknowledged that he did not call the employer again after the discussion with the supervisor at 1:00 a.m., as he concluded it would not serve any purpose to leave a further message regarding his absence at that time.

On October 2 the claimant obtained other transportation back to Ames and arrived there approximately 8:00 p.m. However, the business client had contacted the employer at approximately 3:55 p.m. to indicate it was ending the assignment due to the claimant's attendance, and Ms. McClure spoke to the claimant at approximately 4:10 p.m. and informed him that the assignment had been terminated. Other than the verbal reminder on September 29 that he was to call both the business client and the employer if he was going to miss work, the claimant had not been given any warnings regarding his attendance or employment.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer discharged him for reasons establishing work-connected misconduct as defined by the unemployment insurance law. 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). The question is not whether the employer or business client was right to terminate the claimant's employment or assignment, 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 matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

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 § 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.

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.

Excessive unexcused absences can constitute misconduct. However, in order to establish the necessary element of intent, the final incident must have occurred despite the claimant's knowledge that the occurrence could result in the loss of his job; absences must be both excessive and unexcused – not due to illness or other reasonable grounds. Cosper, supra; Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). Prior to October 1, 2006, the claimant's absences were all due to illness and would be considered excused, and the absence on October 1 was also due to something other than reasonably foreseeable and avoidable problem. In this case, the employer asserts that the final absence should not be considered excused as it was not properly reported, since he did not also advise the employer of his absence. Under the circumstances of this case, the claimant's failure to report the absence also to the employer on that night was the result of inefficiency, unsatisfactory conduct, inadvertence,

or ordinary negligence or was a good-faith error in judgment or discretion. The claimant had not previously been warned that future absences or failure to report all absences also to the employer could result in termination. Higgins, supra. The employer has failed to meet its burden to establish misconduct. Cosper, supra. The claimant's absences do not establish his actions were misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's November 15, 2006 decision (reference 04) is affirmed. The employer discharged the claimant but not for disqualifying reasons. 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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