

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

TERRY J PEARSON
GOLFVIEW DR #10
NORTH LIBERTY IA 52317

L A LEASING INC
D/B/A SEDONA STAFFING
612 VALLEY DR
MOLINE IL 61265

Appeal Number: 04A-UI-06391-RT
OC: 05-16-04 R: 03
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 for Misconduct
Section 96.4-3 – Required Findings (Able and Available for Work)
Section 96.5-3 – Failure to Accept Work
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, L A Leasing, Inc., doing business as Sedona Staffing, filed a timely appeal from an unemployment insurance decision dated June 2, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Terry J. Pearson. After due notice was issued, a telephone hearing was held on July 6, 2004, with the claimant participating. Colleen McGuinty, Unemployment Benefits Administrator, participated in the hearing for the employer. The administrative law judge takes official notice of Iowa Workforce Development unemployment insurance records for the claimant. Although not set out on the notice of appeal, the parties permitted the administrative law judge to take evidence on and decide, if necessary,

whether the claimant would be disqualified to receive unemployment insurance benefits because he refused to accept suitable work and whether the claimant would be ineligible to receive unemployment insurance benefits because he was and is not able, available, and earnestly and actively seeking work. The parties waived further notice of this issue.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer off and on since May 2003. The employer is a temporary employment agency. The claimant was assigned to Alside Window Company for a long-term position temporary-to-hire from August 27, 2003 until he was discharged from that position on May 5, 2004. The claimant was to have been hired by Alside as a permanent full-time employee, but the claimant failed the physical of Alside, inasmuch as he failed the drug test. Alside had to let the claimant go, and so informed the employer. The claimant was then assigned for a one-day assignment to Nordstroms on May 24, 2004. The claimant satisfactorily completed this assignment.

Since May 5, 2004, the claimant has placed no restrictions on his availability for work except that for one day, on or about May 27, 2004, the claimant did not have transportation because his vehicle was being repaired and the claimant had a fact-finding unemployment insurance hearing. The claimant has placed no restrictions on his ability to work. The claimant is making an earnest and active search for work by making two in-person job contacts each week.

On May 26, 2004, the employer offered the claimant a short-term position of one week, possibly longer, with Worley, in Cedar Rapids, Iowa. This position paid \$7.00 per hour for a 40-hour week, or a gross weekly wage of \$280.00. This was offered in the claimant's fourth week of unemployment, excluding the one-day assignment to Nordstroms. The claimant refused this offer because he had a fact-finding unemployment insurance hearing the next day and he did not have transportation for that next day. The employer has made no other offers of employment to the claimant. Nordstroms and Alside were both located in Cedar Rapids, Iowa. The claimant was offered a job with another staffing service in Iowa City, Iowa, which paid also \$7.00 per hour for a 40-hour week but he refused this one as well. Pursuant to his claim for unemployment insurance benefits filed effective May 16, 2004, the claimant has received unemployment insurance benefits in the amount of \$1,236.00 as follows: \$206.00 per week for six weeks, from benefit week ending May 22, 2004 to benefit week ending June 26, 2004. The claimant's average weekly wage for unemployment insurance benefits purposes is \$349.73.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.
2. Whether the claimant is disqualified to receive unemployment insurance benefits because he refused to accept suitable work. He is not.
3. Whether the claimant is ineligible to receive unemployment insurance benefits because he is and was not able, available, and earnestly and actively seeking work. He is not.
4. Whether the claimant is overpaid unemployment insurance benefits. He is not.

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 is a temporary employment agency and the claimant was assigned for approximately eight months to Alside Window Company. This was a temporary-to-hire position and the claimant was going to be hired as a permanent employee of Alside when he failed the employer's physical inasmuch as he failed to pass the employer's drug test. Alside let the claimant go. The administrative law judge concludes that this was, in effect, a discharge of the claimant. Accordingly, the administrative law judge concludes that the claimant was discharged on May 5, 2004, even though the employer, L A Leasing, Inc., doing business as Sedona Staffing, continued to attempt to place the claimant.

Disqualifying misconduct arising out of his separation from Alside Window Company on May 5, 2004, must be determined in order to determine whether the claimant might be entitled to unemployment insurance benefits during any periods of unemployment. It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code Section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was

discharged for disqualifying misconduct. The employer's witness, Colleen McGuinty, Unemployment Benefits Administrator, credibly testified that all she knew was that the claimant failed to pass the physical administered by Alside Window Company and as a result, was removed from that assignment because Alside had to let him go. Ms. McGuinty had no personal knowledge or evidence of any deliberate acts or omissions on the part of the claimant constituting a material breach of his duties and/or evincing a willful or wanton disregard of an employer's interest and/or in carelessness or negligence in such a degree of recurrence so as to establish disqualifying misconduct. The claimant credibly testified that he failed to pass the drug test administered by Alside. However, there is no evidence that the drug test administered by Alside to the claimant or the drug testing policy of Alside, meets the requirements of the Iowa drug testing law at Iowa Code Section 730.5. In Eaton v. Iowa Employment Appeal Board, 602 N.W.2d 553 (Iowa 1999), the Iowa Supreme Court determined that in order for a positive drug test to be misconduct sufficient to disqualify someone from unemployment insurance benefits, it had to meet the requirements of the Iowa drug testing law at Iowa Code Section 730.5 and that such drug test would be scrutinized carefully to see that the drug test complied with Iowa law. This decision was also expanded by a more recent case, Harrison v. Employment Appeal Board and Victor Plastics, Inc., 659 N.W.2d 581 (Iowa 2003). Ms. McGuinty had no personal knowledge of Alside's drug testing policy or the claimant's drug test or the fact that the claimant had been let go because of a positive drug test. Accordingly, the administrative law judge is constrained to conclude that there is not a preponderance of the evidence that the claimant was discharged for disqualifying misconduct and, as a consequence, he is disqualified to receive unemployment insurance benefits as a result of his separation from Alside. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant or appropriate compliance with Iowa Code Section 730.5 so as to warrant the claimant's disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided he is otherwise entitled.

Iowa Code Section 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

The administrative law judge concludes that the claimant has the burden of proof to show that he is able, available, and earnestly and actively seeking work under Iowa Code Section 96.4-3 or is otherwise excused. New Homestead v. Iowa Department of Job Service, 322 N.W.2d 269 (Iowa 1982). The administrative law judge concludes that the claimant has met his burden of proof to demonstrate by a preponderance of the evidence either that he was and is, at all material times hereto, able, available, and earnestly and actively seeking work. Both the

claimant and the employer's witness, Colleen McGuinty, Unemployment Benefits Administrator, testified that the claimant had placed no restrictions on his ability or availability for work other than on or about May 26, 2004, the claimant turned down an offer of short-term work for Worley, in Cedar Rapids, Iowa. The claimant did so because he had a fact-finding the next day and he had no transportation that particular day or the next day. The claimant testified, however, that he got his vehicle repaired right away and was only out of transportation one or two days. The administrative law judge concludes that the vehicle's repairs for one or two days and his fact-finding hearing do not unreasonably impede the claimant's opportunity to get employment and, therefore, he remains available for work, despite these matters. The claimant credibly testified further that he was making an earnest and active search for work by making two in-person contacts each week. Accordingly, the administrative law judge concludes that the claimant is able, available, and earnestly and actively seeking work and, as a consequence, he is not ineligible to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided he is otherwise entitled.

Iowa Code Section 96.5-3-a provides:

An individual shall be disqualified for benefits:

3. Failure to accept work. If the department finds that an individual has failed, without good cause, either to apply for available, suitable work when directed by the department or to accept suitable work when offered that individual. The department shall, if possible, furnish the individual with the names of employers which are seeking employees. The individual shall apply to and obtain the signatures of the employers designated by the department on forms provided by the department. However, the employers may refuse to sign the forms. The individual's failure to obtain the signatures of designated employers, which have not refused to sign the forms, shall disqualify the individual for benefits until requalified. To requalify for benefits after disqualification under this subsection, the individual shall work in and be paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

a. In determining whether or not any work is suitable for an individual, the department shall consider the degree of risk involved to the individual's health, safety, and morals, the individual's physical fitness, prior training, length of unemployment, and prospects for securing local work in the individual's customary occupation, the distance of the available work from the individual's residence, and any other factor which the department finds bears a reasonable relation to the purposes of this paragraph. Work is suitable if the work meets all the other criteria of this paragraph and if the gross weekly wages for the work equal or exceed the following percentages of the individual's average weekly wage for insured work paid to the individual during that quarter of the individual's base period in which the individual's wages were highest:

- (1) One hundred percent, if the work is offered during the first five weeks of unemployment.
- (2) Seventy-five percent, if the work is offered during the sixth through the twelfth week of unemployment.
- (3) Seventy percent, if the work is offered during the thirteenth through the eighteenth week of unemployment.

(4) Sixty-five percent, if the work is offered after the eighteenth week of unemployment.

However, the provisions of this paragraph shall not require an individual to accept employment below the federal minimum wage.

The administrative law judge concludes that the employer has the burden to prove that the claimant has refused to accept suitable work. Norland v. Iowa Department of Job Service, 412 N.W.2d 904, 910 (Iowa 1987). The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant refused to accept suitable work. Both Ms. McGuinty and the claimant credibly testified that the claimant was offered a short-term position with Worley, in Cedar Rapids, Iowa. This was for one week and possibly longer. It paid \$7.00 per hour for a 40-hour week, or a gross weekly wage of \$280.00. This offer was made in the claimant's fourth week of unemployment. In order to be suitable, this position needed to pay the claimant 100 percent of his average weekly wage of \$349.73. It did not. Accordingly, the administrative law judge concludes that this offer was not suitable because of the pay. The claimant refused this offer because he had a fact-finding unemployment insurance hearing the next day and had no transportation because his car was temporarily being repaired. The administrative law judge would conclude that the claimant had good causes for turning down this job since it was only a short-term one-week position. There was evidence that the claimant may have refused other jobs, but they too paid less than the claimant's average weekly wage and were also therefore not suitable work. Accordingly, the administrative law judge concludes that the claimant did not refuse any offers of suitable work and, as a consequence, he is not disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided he is otherwise entitled.

Iowa Code Section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$1,236.00 since separating from his assignment with Alside or about May 5, 2004, and filing for such benefits effective May 16, 2004. The administrative law judge concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision dated June 2, 2004, reference 01, is affirmed. The claimant, Terry J. Pearson, is entitled to receive unemployment insurance benefits, provided he is

otherwise eligible, because he was discharged from his assignment with Alside, but not for disqualifying misconduct. The claimant is able, available, and earnestly and actively seeking work and has not refused an offer of suitable work. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out of her worker's contract of employment out of his separation from the employer herein.

b/tjc