IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MICHAEL N HOFFMAN
Claimant

DOBBS TEMPORARY SERVICES INC
Employer

APPEAL NO. 07A-UI-08566-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/22/07 R: 02
Claimant: Respondent (1)

Section 96.5-1-j – Temporary Employment
871 IAC 24.26(19) – Temporary Employment
Section 96.5-2-a – Discharge
Section 96.7-2-a(2) – Charges Against Employer's Account

STATEMENT OF THE CASE:

Dobbs Temporary Services, Inc./Pro Staff – Des Moines (employer) appealed a representative's August 29, 2007 decision (reference 04) that concluded Michael N. Hoffman (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 September 24, 2007. The hearing notice mailed to the claimant's last known address of record was returned to the Appeals Section as undeliverable; the claimant therefore did not participate in the hearing. Sandra Dohlby appeared on the employer's behalf. Based on the evidence, the arguments of the employer, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was there a disqualifying separation from employment either through a voluntary quit without good cause attributable to the employer or through a discharge for misconduct?

FINDINGS OF FACT:

The employer is a temporary employment firm. The claimant began taking assignments with the employer on April 30, 2007. He had two assignments, both with the same business client. The first assignment ended as of June 22, 2007 on a mutual agreement to move the claimant into another department; that assignment began on June 25, 2007. His last day on the assignment was on or about June 27, 2007. The assignment ended because the employer's business client determined to end it because of concerns regarding the claimant's attendance and a question about a safety violation.

The claimant's assignment was essentially a second-shift position with a base schedule of 3:30 p.m. to 12:00 a.m.; however, the claimant's arrangement provided for flexibility in that schedule. The employer believed there was a specific understanding as to what the maximum

flexibility in that schedule was to be, but could not provide evidence as to what that understanding was.

On June 25, the claimant called in to report that he was taking his wife to the hospital emergency room. The employer did not know if the claimant later reported in for any portion of his shift that night. The employer did not know if the claimant worked the agreed upon hours on June 26. On June 27, the claimant called sometime prior to 5:00 p.m. to report that he might be late due to continued health issues regarding his wife. At about 5:00 p.m. Ms. Dohlby, the account manager, called the claimant to advise him that if he did not make it to work his job could be in jeopardy due to his attendance; he had previously been absent once, May 24, and late for work once, June 22, due to transportation issues. She believed that the claimant's agreed-upon start time for June 27 may have been 6:00 p.m. She did not know whether the claimant did report for work that night and if so at what time.

The business client informed Ms. Dohlby on or about June 28 that it was ending the claimant's assignment due to his attendance and a cut he had suffered presumably on one of the three days in that assignment, allegedly due to not wearing a safety glove; no further details were available on the circumstances of the injury. The claimant came into the employer's office on or about June 28 but had his children with him, so Ms. Dohlby told him to come back the next day to discuss the assignment. He returned to the office on June 29 at which time she informed him of the business client's decision to end the assignment. The claimant did not sign the reassignment log at that time and did not maintain contact with the employer after that point to continue to pursue reassignment as required to preserve his employment status with the employer.

The claimant established an unemployment insurance benefit year effective July 22, 2007.

REASONING AND CONCLUSIONS OF LAW:

The essential question in this case is whether there was a disqualifying separation from employment. The first subissue in this case is whether the employer or the business client ended the claimant's assignment and effectively discharged him for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer or client was right or even had any other choice but to terminate the claimant's employment, 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 questions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988). A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. 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 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.

The primary reason the employer was forced to discharge the claimant from his assignment was his attendance. In order to be misconduct, absenteeism must be both excessive and unexcused. The record does not establish that the claimant's attendance occurrences were both excessive and unexcused. As to the cut, the employer has not established that it was more than the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence in an isolated instance, or a good faith error in judgment or discretion, as compared to

intentional, substantial, or repeated misbehavior. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). The employer has failed to meet its burden to establish misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

The second subissue in this case is whether the claimant voluntarily quit by failing to affirmatively pursue reassignment.

Iowa Code § 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.

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 § 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 § 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 intent of the law is to avoid situations where a temporary assignment has ended and the claimant is unemployed, but the employer is unaware that the claimant is not working could have been offered an available new assignment to avoid any liability for unemployment insurance benefits. Where a temporary employment assignment has ended and the employer is aware of the end of that assignment, the employer is already on "notice" that the assignment is ended and the claimant is available for a new assignment; where the claimant knows that the employer is aware of the ending of the assignment, he has good cause for not separately "notifying" the employer.

Here, the employer was aware that the business client had ended the assignment; it considered the claimant's assignment to have been completed, albeit unsuccessfully. Further, the claimant was physically in the employer's office and was clearly not on assignment at that time; if the employer wished to rely exclusively on the signing of the reassignment log, which is not a requirement of the statute, the employer could have reminded the claimant at that time to sign the log. As to his failure to maintain contact after that date, that is also not a requirement of the statute. Under the facts of this case, regardless of whether the claimant explicitly reported for a new assignment, the separation is deemed to be completion of temporary assignment and not a voluntary leaving; a refusal of an offer of a new assignment would be a separate potentially disqualifying issue. Benefits are allowed, if the claimant is otherwise eligible.

The final issue is whether the employer's account is subject to charge. An employer's account is only chargeable if the employer is a base period employer. Iowa Code § 96.7. The base period is "the period beginning with the first day of the five completed calendar quarters immediately preceding the first day of an individual's benefit year and ending with the last day of the next to the last completed calendar quarter immediately preceding the date on which the individual filed a valid claim." Iowa Code § 96.19-3. The claimant's base period began April 1, 2006 and ended March 31, 2007. The employer did not employ the claimant during this time, and therefore the employer is not currently a base period employer and its account is not currently chargeable for benefits paid to the claimant.

DECISION:

The representative's August 29, 2007 decision (reference 04) is affirmed. The claimant did not voluntarily quit and the employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible. The employer's account is not subject to charge in the current benefit year.

_____
Lynette A. F. Donner
Administrative Law Judge

_____
Decision Dated and Mailed

ld/css