

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JAY K WARD
Claimant

APPEAL NO: 08A-UI-09168-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

EXPRESS SERVICES INC
Employer

OC: 08/24/08 R: 04
Claimant: Respondent (1/R)

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:

Express Services, Inc. (employer) appealed a representative’s October 1, 2008 decision (reference 01) that concluded Jay K Ward (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 October 23, 2008. The claimant participated in the hearing. Mike Schaul appeared on the employer’s behalf. 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.

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? Is the employer’s account subject to charge?

FINDINGS OF FACT:

The employer is a temporary employment firm. The claimant’s first and to date only assignment began on June 17, 2008. He worked full time as a buffer at the employer’s chrome manufacturing business client. His last day on the assignment was August 21, 2008. The assignment ended because the employer’s business client determined to end it because of a conclusion he was spending too much time in the bathroom and did not have a satisfactory production quantity. He had not been given any warnings regarding his performance.

When the employer’s representative spoke with the claimant on August 21 regarding the ending of the assignment, they also discussed the potential of other assignments; the representative indicated that the employer would see if they could find something else for the claimant. Nothing was said regarding any need to check back in further with the employer regarding pursuing those other assignments, so the claimant assumed the representative meant that the

employer would contact the claimant if there was some other work available for him. He therefore did not periodically check back with the employer.

The employer has an 11-page policy handbook; the last page includes a number of miscellaneous policy items (unrelated to reassignment) and an acknowledgement signature area. This last page also has a paragraph indicating that an employee must contact the employer within 48 hours after the ending of an assignment to seek reassignment, with a parenthetical noting that the length of time may be different in some states pursuant to state law. The form does not specify that under Iowa law the requirement is three business days.

The claimant established an unemployment insurance benefit year effective August 24, 2008. Some evidence was presented regarding a potential offer of reassignment made to the claimant on September 22.

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).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer or its business client for ending the claimant's assignment is his unsatisfactory job performance. Misconduct connotes volition. A failure in job performance is not misconduct unless it is intentional. Huntoon, supra. There is no evidence the claimant intentionally performed below the business client's expectations. The employer has not met its

burden to show disqualifying 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.

An employee of a temporary employment firm who has been given proper notice of the requirement can be deemed to have voluntarily quit his employment with the employer if he fails to contact the employer within three business days of the ending of the assignment in order to notify the employer of the ending of the assignment and to seek reassignment. Iowa Code § 96.5-1-j. The intent of the statute 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 by the completion of the assignment of and the employer is aware of the ending 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. 871 IAC 24.26(19). Further, his discussion with the employer's representative on August 21 indicating interest in reassignment adequately complies with the requirement. Additionally, the claimant not properly on notice of the requirement to seek reassignment; the employer's provision on seeking reassignment did not specify the Iowa requirement, and more importantly, it was not given as a "document that provides a clear and concise explanation of the notification requirement and the consequences of a failure to notify . . . separate from any contract of employment . . ." Iowa Code § 96.5-1-j.

Here, the employer was on notice that the business client had ended the assignment and that the claimant was interested in reassignment; it considered the claimant's assignment to have been completed, albeit unsatisfactorily. The claimant is not required by the statute to remain in regular periodic contact with the employer in order to remain "able and available" for work for purposes of unemployment insurance benefit eligibility. Regardless of whether the claimant continued to seek a new assignment, the separation itself 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, 2007 and ended March 31, 2008. 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.

An issue as to whether the claimant may have refused an offer of work made on or about September 22, 2008 arose during the hearing. This issue was not included in the notice of

hearing for this case, and the case will be remanded for an investigation and preliminary determination on that issue. 871 IAC 26.14(5).

DECISION:

The representative's October 1, 2008 decision (reference 01) is affirmed. The claimant did not voluntarily quit and the employer did effectively discharge the claimant from his assignment 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. The matter is remanded to the Claims Section for investigation and determination of the potential refusal issue.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs