IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

LEE A METZ
Claimant

L A LEASING INC
SEDONA STAFFING
Employer

APPEAL NO. 10A-UI-08643-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/28/08
Claimant: Respondent (2-R)

Section 96.5(1)(j) – Separation from Temporary Employment
Section 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

The employer filed an appeal from the February 24, 2010, reference 06, decision that allowed benefits. After due notice was issued, a hearing was held by telephone conference call on August 17, 2010. Claimant Lee Metz participated. Colleen McGuinty, Unemployment Benefits Administrator, represented the employer and presented additional testimony through Abigail Schueller, Account Manager. Department Exhibits D-1 through D-4 were received into evidence. The administrative law judge took official notice of the Agency's administrative record of benefits disbursed to Mr. Metz. The parties waived any formal notice issues based on the deficiencies in the issue statements regarding whether there was a discharge for misconduct and whether the claimant was overpaid benefits. The administrative law judge took official notice of the Agency's administrative record of benefits disbursed to Mr. Metz.

ISSUES:

Whether the employer's appeal was timely.

Whether Mr. Metz was discharged from his work assignment for misconduct in connection with the employment.

Whether Mr. Metz separated from the temporary employment agency for good cause attributable to the employer.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: On February 24, 2010, Workforce Development mailed a copy of the February 24, 2010, reference 06, decision to the employer's last known address of record. The decision allowed benefits to claimant Lee Metz. The employer received the decision in a timely manner prior to the deadline for appeal. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by March 6, 2010. On March 4, 2010, the employer faxed its appeal to the Appeals Section. The employer's fax confirmation documentation and the Appeals Section fax confirmation documentation together indicate a successful transmission of the appeal and the appeal was received by the Appeals Section on March 4, 2010. The Appeals Section did not docket the

employer's appeal and apparently misplaced the two-page appeal materials. The employer followed up with a second faxed appeal on June 18, 2010, which faxed appeal was received on that date and was docketed for hearing.

The employer is a temporary employment agency. Lee Metz commenced working in temporary employment work assignments through L.A. Leasing, Inc./Sedona Staffing in 2005. On September 15, 2009, Mr. Metz started a full-time work assignment at Pacific Coast Feather Company. On November 8, Pacific Coast Feather Company ended the assignment due to Mr. Metz's attendance. Mr. Metz had cut his hand outside of work on November 6, 2009 and required 14 stitches. Mr. Metz was absent from work on November 7 and 8. On November 7, Mr. Metz had notified the client business within an hour of the scheduled start of his shift that he would be absent a number of days due to the injury. This complied with the client business's absence reporting policy. Mr. Metz was also required to notify Sedona Staffing of the absences, but did not notify Sedona Staffing of his need to be gone on November 7 or 8. Mr. Metz had been absent due to illness properly reported earlier in the assignment.

On November 8, Abigail Schueller, Account Manager, left a message on Mr. Metz's telephone notifying him that he need not return to the assignment. The temporary employment agency had no further contact with Mr. Metz after that.

In December 2007 the employer had Mr. Metz sign an availability statement that obligated him to contact Sedona Staffing within three working days of the completion of an assignment to indicate his availability for a new assignment. The statement placed Mr. Metz on notice that he risked being disqualified for unemployment insurance benefits if he failed to make contact with the employer within the prescribed period. The policy was presented to Mr. Metz as a stand-alone policy statement with no other policies on the document. Mr. Metz signed the document and was provided with a copy of the document.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.6-2 provides:

> 2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs "a" through "h". Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no

> employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The ten-day deadline for appeal begins to run on the date Workforce Development mails the decision to the parties. The "decision date" found in the upper right-hand portion of the Agency representative's decision, unless otherwise corrected immediately below that entry, is presumptive evidence of the date of mailing. Gaskins v. Unempl. Comp. Bd. of Rev., 429 A.2d 138 (Pa. Comm. 1981); Johnson v. Board of Adjustment, 239 N.W.2d 873, 92 A.L.R.3d 304 (Iowa 1976).

An appeal submitted by mail is deemed filed on the date it is mailed as shown by the postmark or in the absence of a postmark the postage meter mark of the envelope in which it was received, or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion. See 871 AC 24.35(1)(a). See also Messina v. IDJS, 341 N.W.2d 52 (Iowa 1983). An appeal submitted by any other means is deemed filed on the date it is received by the Unemployment Insurance Division of Iowa Workforce Development. See 871 IAC 24.35(1)(b).

The weight of the evidence indicates that the employer submitted a timely appeal that was received by the Appeals Section on March 4, 2010 and misplaced by the Appeals Section. By submitting a timely appeal, the employer preserved its right to be heard on appeal. The administrative law judge has jurisdiction to consider the appeal and rule on the merits of the appeal.

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.

The employer has the burden of proof in a discharge 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 a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's *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).

The weight of the evidence in the record establishes that on November 7, Mr. Metz provided notice to the client business regarding his need to be absent on November 7, November 8, and possibly longer. In response to this, the client business ended the assignment. While Mr. Metz provided proper notice to the client business, he did not provide proper notice to Sedona Staffing of his need to be absent on November 7 and 8. Accordingly, the absences on November 7 and 8 were unexcused absences under the applicable law. Given the basis for the absences, and given the partial notice Mr. Metz provided by notifying the client business, the administrative law judge concludes that Mr. Metz's absences on November 7 and 8 did not constitute excessive unexcused absences. Thus, Mr. Metz was discharged *from the assignment* for no disqualifying reason.

The next question is whether Mr. Metz's separation from the temporary employment agency was good cause attributable to that 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 employer's Availability Statement satisfied the requirement of Iowa Code section 96.5(1)(j). The weight of the evidence indicates that Mr. Metz did not in fact contact Sedona Staffing within three working days of his assignment coming to an end on November 8, 2009 and was not in a position to be placed in a new assignment in light of his injury. The administrative law judge concludes that Mr. Metz's separation from the temporary employment agency was without good cause attributable to Sedona Staffing. Effective November 8, 2009, Mr. Metz is disqualified for benefits until he has worked in and had been paid wages for insured work equal to ten times his weekly benefit amount, provided he was otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Metz for the period commencing November 8, 2009.

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the

employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The Agency representative's February 24, 2010, reference 06, decision is reversed. While the claimant was discharged from his temporary employment work assignment effective November 8, 2009 for no disqualifying reason, the claimant failed to make appropriate contact with the temporary employment agency to seek a new work assignment. Claimant's separation from the temporary employment agency was without good cause attributable to the temporary employment agency. Effective November 8, 2009, the claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account will not be charged for benefits paid to the claimant for the period commencing November 8, 2009.

This matter is remanded to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/kjw