IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DEWAYNE E ROWLEY
Claimant

QPS EMPLOYMENT GROUP INC
Employer

APPEAL NO. 17A-UI-03861-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/12/17
Claimant: Respondent (1)

Iowa Code Section 96.5(1)(j) – Separation From Temporary Employment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 27, 2017, reference 01, decision that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on the claims deputy's conclusion that the claimant's March 6, 2017 separation was for good cause attributable to the temporary employment firm. After due notice was issued, a hearing was held on May 3, 2017. Claimant DeWayne Rowley participated. Rhonda Hefter de Santisteban represented the employer and presented additional testimony through Jason Sheldahl, Onsite Manager.

ISSUE:

Whether the claimant's March 2017 separation from the temporary employment agency was for good cause attributable to the employer.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: QPS Employment Group, Inc. is a temporary employment agency. QPS's clients include Titan Tire Corporation. QPS maintains an onsite manager at the Titan Tire plant in Des Moines. DeWayne Rowley commenced his employment relationship with QPS in December 2016. On December 19, 2016, Mr. Rowley electronically signed the QPS 3-Day Reassignment Policy. Mr. Rowley did not read the policy before he signed it. The policy stated as follows:

> Once you complete an assignment with a client, it is your duty to contact QPS for reassignment within three (3) working days as required by Iowa Code Section 96.5-1-j. Failure to report within three (3) days for reassignment or to accept a new job assignment offered without reasonable cause will indicate that you have refused available work and quit working for QPS Employment Group. Furthermore, failure to seek reassignment may result in disqualification for unemployment benefits pursuant to Iowa Code Section 96.5-1-j.

Immediately above the space provided on the document for Mr. Rowley's signature, the document stated as follows: "My signature below means that I understand and have received a

copy of the above policy." Mr. Rowley signed the document without reading it. QPS receptionist Amelia Gibson facilitated Mr. Rowley's application for employment and did not ensure that Mr. Rowley had read the 3-Day Reassignment Policy. QPS provided a copy of the document to Mr. Rowley as part of a 50-page packet of materials.

On December 20, 2016, Mr. Rowley began a full-time, long-term forklift operator work assignment at Titan Tires. Mr. Rowley's work hours in the assignment were 6:30 a.m. to 3:00 p.m., Monday through Friday. Prior to February 19, Beth Lauck was the QPS Onsite Manager at Titan Tires. Mr. Rowley last performed work in the assignment and completed the assignment on March 6, 2017. On that day, Titan Tires representative Jamie Van Winegarden notified QPS Onsite Manager Jason Sheldahl, that Titan Tires was ending the assignment for attendance. Mr. Van Winegarden was Mr. Rowley's immediate supervisor at Titan Tire. Mr. Sheldahl had become the Onsite Manager in training on February 19, 2017. Ms. Lauck continued to represent QPS at Titan Tire.

The final absence that triggered Titan Tires' decision to end the assignment occurred on March 7, 2017, when Mr. Rowley was absent due to sore back. Mr. Rowley's back was sore from unloading a trailer of tires the previous day. Mr. Rowley telephoned the designated absence reporting line sometime between 8:00 a.m. and 9:00 a.m. Mr. Rowley did not state the reason for the absence in the voicemail message he left that morning. Titan Tires had assigned attendance points to Mr. Rowley's absences and ended the assignment when Mr. Rowley exceeded the allowable number of attendance points. Titan Tires considered Mr. Rowley's absences and related attendance points going back to January 4, 2017. On that day, Mr. Rowley was absent due to illness and properly reported the absence. If Mr. Rowley needed to be absent from the employment, Titan Tires' attendance policy required that Mr. Rowley telephone a designated absence reporting telephone number at least two hour prior to the scheduled start of his shift. Mr. Rowley was aware of the policy. On January 10, Mr. Rowley was absent, but neither he nor the employer recalls why he was absent or when he provided notice of his need to be absent. On January 13, 2017, Mr. Rowley was absent so that he could go to a medical appointment and properly reported the absence. On January 20, Mr. Rowley was absent for a reason that neither he nor the employer can recall and properly reported the absence. On February 1, 2017, Mr. Rowley was absent for a portion of the day for a medical appointment and properly notified the employer. On February 3, Mr. Rowley was absence for a reason that neither he nor the employer can recall and properly reported the absence. All of the above absences occurred prior to Mr. Sheldahl becoming the Onsite Manager and would have been handled by Mr. Sheldahl's predecessor, Beth Lauck.

Mr. Rowley had been unhappy with the assignment since it began. The document that Mr. Rowley signed to accept the assignment set forth the job duties. The job description indicated that in addition to operating a forklift, the job assignment would include moving tires by hand. Mr. Rowley did not read the job assignment document before he signed it. Once Mr. Rowley was in the assignment, moving tires by hand was immediately part of the work duties. Mr. Rowley is 50 years old and found the work physically taxing. Mr. Rowley had asked Mr. Sheldahl's predecessor, Beth Lauck, to change his duties to strictly operating a forklift, but QPS and Titan declined to change the assignment. On March 1, 2017, Mr. Rowley told Ms. Lauck that he was giving QPS and Titan Tire two weeks to change his work duties. Mr. Rowley then continued to report for work in the assignment through March 6, 2017.

After Titan Tires notified Mr. Sheldahl on March 7, 2017, that it was ending the assignment, Mr. Sheldahl attempted to contact Mr. Rowley that same day by telephone call and text message. At 1:28 p.m. on March 7, Mr. Sheldahl sent a text message to Mr. Rowley advising that Titan had ended the assignment and directing Mr. Rowley to return the Titan-issued hearing

protection equipment, “ear muffs,” to avoid being charged for the equipment. At 3:01 p.m. Mr. Rowley responded by text message that he would return the ear muffs the next day.

Mr. Rowley returned the hearing protection equipment to Mr. Sheldahl the next day. During that contact, Mr. Rowley complained that he was hired as a forklift driver, had given QPS and Titan two weeks to move him to different duties so he did not have to move tires, and asserted that he was too old to move tires. Mr. Sheldahl told Mr. Rowley to go to the QPS office to see if there was another assignment that would be a better fit for Mr. Rowley. Titan’s decision to end the assignment did not prompt QPS to end the QPS employment. QPS remained willing to find a new assignment for Mr. Rowley.

Mr. Rowley did not make further contact with QPS to request a new assignment. After Mr. Rowley failed to make contact on March 8, 9 and 10, QPS concluded that Mr. Rowley had quit the QPS employment.

REASONING AND CONCLUSIONS OF LAW:

The administrative law judge will first address the question of whether Mr. Rowley’s separation from the Titan Tire assignment was for a reason that disqualifies him for unemployment insurance benefits. The administrative law judge will later address the separate issue of whether Mr. Rowley separated from QPS for a reason that disqualifies him for benefits or that relieves QPS of liability for benefits paid to Mr. Rowley.

Titan Tires decision to end the assignment was a discharge from the assignment, but not the employment with QPS.

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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.,* 275 N.W.2d 445, 448 (Iowa 1979).

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). Employers may not graft on additional requirements to what is an excused absence under the law. See *Gaborit v. Employment Appeal Board*, 743 N.W.2d 554 (Iowa Ct. App. 2007). For example, an employee's failure to provide a doctor's note in connection with an absence that was due to illness properly reported to the employer will not alter the fact that such an illness would be an excused absence under the law. *Gaborit*, 743 N.W.2d at 557.

In this case the final absence on March 7, 2017 was due to Mr. Rowley's sore back. His back was sore because he was a 50-year old man performing physically taxing manual labor. Mr. Rowley asserts that he did indeed properly notify Titan Tires of the absence by leaving a voicemail message on the designated absence reporting line. The employer has presented insufficient evidence to rebut Mr. Rowley's testimony regarding the basis for the absence and notice provided of the absence. Accordingly, there is insufficient evidence to establish an unexcused absence on March 7, 2017. The next most recent absence that factored in Titan's decision to end the assignment occurred more than a month earlier. The discharge from the assignment was not based on excessive unexcused absences or other misconduct in connection with the assignment. The discharge from the assignment did not disqualify Mr. Rowley for unemployment insurance benefits.

The administrative law judge will now turn to Mr. Rowley's separation from the actual employer, QPS.

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. (1) 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.

(2) 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.

(3) For the purposes of this paragraph:

(a) "Temporary employee" means an individual who is employed by a temporary employment firm to provide services to clients to supplement their workforce during absences, seasonal workloads, temporary skill or labor market shortages, and for special assignments and projects.

(b) "Temporary employment firm" means a person engaged in the business of employing temporary employees.

Iowa Admin. Code r. 871-24.26(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 language in the employer's written 3-Day Reassignment Policy sufficiently complies with the requirement of the Iowa Code section 96.5(1)(j). However, the process by which the employer presented that document to Mr. Rowley did not sufficiently comply with the requirements of the statute. While Mr. Rowley's failure to review information regarding the conditions of his employment is not to be admired, it was the employer, not Mr. Rowley, that bore the responsibility of "requiring the temporary employee, at the time of the employment with the temporary employment firm, to *read* and sign" the document. [Emphasis added.] Because employer did not comply with the requirement of the statute, Mr. Rowley's failure to make further contact with QPS to request a new assignment did not disqualify him for benefits and did not relieve QPS of liability for benefits. Mr. Rowley's March 7, 2017 separation from QPS was for good cause attributable to the employer. Mr. Rowley is eligible for benefits provided he meets all other eligibility requirements. The employer's account may be charged

DECISION:

The March 27, 2017, reference 01, decision is affirmed. The separation date is corrected to March 7, 2017. The claimant's separation from the temporary employment agency was for good cause attributable to the temporary employment agency. The claimant is eligible for benefits provided he is otherwise eligible. The employer's account may be charged for benefits paid to the claimant.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs