IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MELISSA A ANDERSON
Claimant

MANPOWER INTERNATIONAL INC
Employer

APPEAL NO. 12A-UI-09240-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/22/12
Claimant: Appellant (2)

Section 96.5(2)(a) – Discharge for Misconduct
Section 96.5(1)(j) – Temporary Employment Separation

STATEMENT OF THE CASE:

Melissa Anderson filed a timely appeal from the July 25, 2012, reference 03, decision that denied benefits. After due notice was issued, a hearing was held on August 23, 2012. Ms. Anderson participated. Staffing Specialist Beth Smith represented the employer. The hearing in this matter was consolidated with the hearing in Appeal Number 12A-UI-09241-JTT. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant.

ISSUES:

Whether the claimant was discharged from the assignment at Pech Optical for misconduct in connection with the employment.

Whether the claimant's 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: The employer is a temporary employment agency. On May 9, 2012, Manpower International placed Melissa Anderson in a full-time, temp-to-hire work assignment at Pech Optical. Ms. Anderson's work hours were 7:30 a.m. to 3:30 p.m., Monday through Friday. Ms. Anderson had two supervisors at Pech Optical, Marcy Knoll and April (last name unknown). Manpower International Staffing Specialist Beth Smith had placed Ms. Anderson in the assignment and followed her work on behalf of Manpower International.

At the time of hire, Manpower International notified Ms. Anderson of her obligation to contact Manpower if she needed to be late or absent from work. Manpower also notified Ms. Anderson that she should let Manpower know, after-the-fact, if she was absent or late and had not given prior notice. Ms. Anderson followed this policy in connection with her first absence on May 11 2012, when she missed part of a shift due to illness. Later that same day, Ms. Anderson felt better and reported for work at Pech Optical. At that time, Ms. Anderson learned that Pech

Optical had been unaware of her need to be absent from the shift. At that point, the supervisors at Pech Optical advised Ms. Anderson to notify them if she needed to be gone from the assignment.

Ms. Anderson's second absence occurred on May 21, 2012, when she needed to be absent to attend a medical appointment. Ms. Anderson had given prior notice to Pech Optical of the need to be absent, but had not notified Manpower International directly.

Ms. Anderson's final absence, the one that triggered her discharge from the assignment, occurred on June 21, 2012, when Ms. Anderson was absent because she needed to take her sick son to a couple of medical appointments. Ms. Anderson notified the supervisors at Pech Optical prior to her shift, but did not make direct contact with Manpower International. After that absence, Pech Optical notified Manpower International that they were ending the assignment. The contact from Pech optical was Manpower's first knowledge of the second and third absence.

On the evening of June 21, Ms. Smith notified Ms. Anderson that the Pech Optical assignment was ended due to attendance. Ms. Anderson did not request a further assignment and Ms. Smith did not mention further employment. Ms. Anderson concluded that her discharge from the assignment meant that she was also discharged from Manpower International. There was no further contact between the parties.

At start of the employment, Manpower International had Ms. Anderson sign a document that included an availability policy. One part of the document indicated that Ms. Anderson needed to notify the employer within 48 hours of the end of an assignment that she was available for an additional assignment. Another part of the document indicated an Iowa-specific requirement that Ms. Anderson contact the employer within three working days of the end of assignment. The document on which the availability policy appeared contained multiple additional policies. The employer did not have Ms. Anderson execute a separate document that contained only a policy regarding her obligation to contact Manpower at the end of an assignment or risk ineligibility for unemployment insurance benefits.

REASONING AND CONCLUSIONS OF LAW:

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 this 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).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

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.

The weight of the evidence establishes three absences that were due to illness during an assignment that lasted six weeks. The first absence was properly reported to Manpower and was an excused absence under the applicable law. The second and third absence were reported to Pech Optical, the client business, but were not reported to Manpower, which was the employer. The weight of the evidence indicates that Ms. Anderson knew at the start of the employment that she was required to notify Manpower if she needed to be absent. Thus, the weight of the evidence establishes an unexcused absence on May 21 and June 21 based on the failure to contact Manpower. Given the basis for the absences and given the notice provided to Pech Optical of the absences, the administrative law judge concludes that the unexcused absences were not excessive and did not constitute misconduct in connection with the employment. Thus, the discharge from the work assignment would not disqualify Ms. Anderson for unemployment insurance benefits.

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 evidence indicates that the employer's end of assignment notification policy did not comply with requirements of Iowa Code section 96.5(1)(j), which requires a clear and concise statement of an obligation to contact the temporary employment agency within three working days of the end of an assignment and clear notice that failure to do so could render the claimant ineligible for unemployment insurance benefits. The employer's policy statement buried the notification policy amongst other policies in a single document and provided conflicting statements concerning the obligation to notify the employer at the end of an assignment to request additional work. The administrative law judge notes that the employer did not provide a copy of the policy for the hearing. Because the employer's policy did not comply with the statutory requirements, the employer cannot claim the benefit of the policy to argue the claimant's ineligibility for benefits. The claimant's obligation to the employer ended with her discharge from the work assignment.

DECISION:

The Agency representative's July 25, 2012, reference 03, decision is reversed. The claimant was discharged from her work assignment on June 21, 2012 for no disqualifying reason. The claimant's separation from the temporary employment agency on that same day was for good cause attributable to the employer. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

_____
James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

jet/kjw