

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SARAH A WILKINSON

Claimant

APPEAL NO: 13A-UI-01526-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MIDWEST PROFESSIONAL STAFFING LLC

Employer

OC: 01/06/13

Claimant: Respondent (5)

Section 96.5-2-a – Discharge
Section 96.4-3 – Able and Available

STATEMENT OF THE CASE:

Midwest Professional Staffing, L.L.C. (employer) appealed a representative's January 29, 2013 decision (reference 01) that concluded Sarah A. Wilkinson (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 March 8, 2013. The claimant participated in the hearing. Rachel Michael 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 the claimant discharged for work-connected misconduct? Is the claimant able and available for work?

OUTCOME:

Modified with no effect on the parties. Benefits allowed.

FINDINGS OF FACT:

The employer is a temporary staffing agency. The claimant began taking assignments through the employer on February 24, 2010. Her final assignment began on March 30, 2010. She worked full time as a mail clerk at the employer's business client through about January 11, 2012. The business client ended her assignment as of that date. The reason asserted for the discharge was excessive absenteeism. The most recent occurrence was that she had called in an absence due to illness on January 11, 2012.

The employer's primary concern was not the situation regarding the end of the assignment on January 11, 2012. Rather, its primary concern was that the claimant's availability for work appeared to be greatly curtailed after the ending of the assignment because the claimant was enrolled in school. After the claimant's January 11, 2012 separation from employment she

established a claim for benefits effective January 8, 2012. During that claim year the employer challenged the claimant's eligibility for unemployment insurance benefits. On September 28, 2012 a representative issued a decision (reference 05) which concluded that the claimant had not refused an offer of suitable work and was not disqualified from receiving unemployment insurance benefits. The employer appealed that decision, and in the hearing presented its concerns about how the claimant's availability for work was restricted by her attending school and that this was preventing her from taking work with the employer. The administrative law judge issued a decision under appeal 12A-UI-11913-ET on November 2, 2012, which concluded that to that point there had not been a bona fide offer of work for the claimant to refuse.

The claimant was granted Department Approved Training (DAT) for various periods, at least beginning February 12, 2012 (as per a representative's decision issued on March 9, 2012 as OC 01/08/12 – reference 03). As of the date of the hearing this pending appeal, the claimant had most recently been granted DAT and training extension benefits (TEB) through June 22, 2013 (as per a representative's decision issued on January 3, 2013 as OC 01/08/12 - reference 11).

REASONING AND CONCLUSIONS OF LAW:

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 question is not whether the employer was right 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 matters. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

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).

Excessive and unexcused absenteeism can constitute misconduct. 871 IAC 24.32(7). A determination as to whether an absence is excused or unexcused does not rest solely on the interpretation or application of the employer's attendance policy. Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional, even if the employer was fully within its rights to assess points or impose discipline up to or including

discharge for the absence under its attendance policy. 871 IAC 24.32(7); *Cosper*, supra; *Gaborit v. Employment Appeal Board*, 734 N.W.2d 554 (Iowa App. 2007). Because the final absence was related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct and no disqualification is imposed. The employer has failed to meet its burden to establish misconduct. *Cosper*, supra. The claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

After a (potentially temporary) separation from a temporary employment firm through ending of a temporary assignment 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. Iowa Code § 96.5-1-j. Regardless of whether the claimant continued to seek a new assignment, the separation itself is deemed to be a completion, albeit unsuccessfully, of a temporary assignment.

With respect to any week in which unemployment insurance benefits are sought, normally in order to be eligible a claimant must be able to work, is available for work, and is earnestly and actively seeking work. Iowa Code § 96.4-3. "The best method of testing availability for work is an offer of work . . ." 871 IAC 24.22(2)b. As was previously determined in the administrative law judge's decision issued in 12A-UI-11913-ET, there was no offer of work to the claimant which would have tested her availability, even in those periods after the separation which the claimant might not have been covered by DAT. Further, the claimant has been granted DAT for at least the majority of time since the claimant's separation from employment.

Iowa Code section 96.4-6-a-b provides:

6. a. An otherwise eligible individual shall not be denied benefits for any week because the individual is in training with the approval of the director, nor shall the individual be denied benefits with respect to any week in which the individual is in training with the approval of the director by reason of the application of the provision in subsection 3 of this section relating to availability for work, and an active search for work or the provision of section 96.5, subsection 3, relating to failure to apply for or a refusal to accept suitable work. However, an employer's account shall not be charged with benefits so paid.

b. An otherwise eligible individual shall not be denied benefits for a week because the individual is in training approved under 19 U.S.C. § 2296(a), as amended by section 2506 of the federal Omnibus Budget Reconciliation Act of 1981, because the individual leaves work which is not suitable employment to enter the approved training, or because of the application of subsection 3 of this section or section 96.5, subsection 3, or a federal unemployment insurance law administered by the department relating to availability for work, active search for work, or refusal to accept work.

For purposes of this paragraph, "suitable employment" means work of a substantially equal or higher skill level than an individual's past adversely affected employment, as defined in 19 U.S.C. § 2319(l), if weekly wages for the work are not less than eighty percent of the individual's average weekly wage.

The claimant is therefore exempt from the requirements to be able and available for work while she remains under the DAT status. However, the employer is not subject to charge for benefits paid to the claimant while she remains in that status.

DECISION:

The representative's January 29, 2013 decision (reference 01) is affirmed as modified with no effect on the parties. The employer did effectively discharge the claimant but not for disqualifying reasons. The claimant has been able and available for work or exempt from the availability requirements. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

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