

**BEFORE THE  
EMPLOYMENT APPEAL BOARD  
Lucas State Office Building  
Fourth floor  
Des Moines, Iowa 50319**

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**SHANOA L LEMKE**

Claimant,

and

**SPHERION STAFFING LLC**

Employer.

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**HEARING NUMBER: 11B-UI-05027**

**EMPLOYMENT APPEAL BOARD  
DECISION**

**N O T I C E**

**THIS DECISION BECOMES FINAL** unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT IS FILED WITHIN 30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

**SECTION: 96.5-2-A**

**D E C I S I O N**

**UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE**

The claimant appealed this case to the Employment Appeal Board. Two members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

**FINDINGS OF FACT:**

The claimant, Shanoa L. Lemke, worked for Spherion Staffing, LLC from March 22, 2010 through March 22, 2011 as a full-time client service supervisor. (Tr. 2, 4-5) Every week, the employer conducts an audit to ensure that employees they've hired have gone through the appropriate hiring process and background check. (Tr. 2, 8) The employer uses the e-verify system, which verifies an employee's social security number through the Department of Homeland Security. (Tr. 2)

At the start of her employment, Kelly Harris (branch manager) trained Ms. Lemke on how to conduct background checks on prospective hires. (Tr. 5) Ms. Harris told her that with certain companies, a background check was not necessary (Tr. 6), and "...it costs the company too much money to do backgrounds all the time..." (Tr. 5) Sometimes Ms. Harris directed the claimant to hire someone and get them to the job site as soon as possible, foregoing the results of a background check. (Tr. 6) On occasion, when Ms. Lemke was unsure if a background check was necessary, she would question Ms.

Harris, who oftentimes referred her to the Sherry Stoltz, the operations manager, who preferred her "...to send in the results of...all provisional backgrounds..." (Tr. 5, 6, 8) Sometimes, Ms. Harris became upset with Ms. Lemke if she didn't perform her duties in the manner Ms. Harris wanted her to, which may have been contrary to the operations manager's directive - Ms. Harris' superior. (Tr. 6)

On September 13, 2010, Ms. Lemke received a verbal warning for sending a new employee out to a client without completing a background check. (Tr. 3) Sometime in December or January, Sherry (operations manager) discovered via audits "...quite a few backgrounds that should not have permitted people to work..." but were allowed to proceed to assignment. (Tr. 9) Sherry sat down with Ms. Lemke and instructed her on what to look for in a prospective hiree's application. At that point, Sherry required her to send in all provisional backgrounds and wait for results prior to assigning the new employee.

Ms. Lemke received a written warning on February 8, 2011 because she sent an employee out to a client before that employee completed his e-forms. (Tr. 3) Ms. Harris didn't present the second warning to her until February 25<sup>th</sup>. When the claimant conducted the backgrounds as Sherry preferred, Ms. Harris became upset and counseled her on February 28<sup>th</sup>. (Tr. 6)

On March 11<sup>th</sup>, Ms. Harris directed the claimant to "...go ahead, get her hired right now so we can get her there as soon as possible..." (Tr. 6) She completed the necessary paperwork, but the completed processing did not occur until March 14<sup>th</sup>. (Tr. 6-7, 8) When the employer discovered that the hiree had been put to work prior to the completion of the background check, the employer terminated Ms. Lemke.

## **REASONING AND CONCLUSIONS OF LAW:**

871 IAC 24.32(4) provides:

*Report required.* The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In the cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

It is clear from this record that Ms. Lemke received conflicting directives from two difference superiors as to when she should conduct background checks, and when it was okay to send the new employee onto an assignment. The claimant provided unrefuted testimony that Ms. Harris sometimes rushed her through the process before a background check concluded before sending out a new employee. (Tr. 6)

Although the employer argues that company policy dictates that all applicants must go through a background check, Ms. Harris did not, specifically, refute the claimant's testimony that the policy only pertained to certain clients. (Tr. 5, 6) According to Ms. Lemke's testimony, she initially received her

training from Ms. Harris who sometimes directed her to bypass certain background processing because Ms. Harris wanted to fill job assignments sooner than later. Ms. Lemke's compliance with her supervisor's directive, placed her at odds with the operations director at times. This cannot be an easy situation for the claimant who tried her best to comply with what Ms. Harris wanted and at the same time comply with Sherry Stoltz's directive. Once Sherry clarified her expectations of the claimant (sometime in December/January) (Tr. 5), Ms. Lemke still experienced pressure from Ms. Harris to rush through background checks for certain applicants. Ms. Harris' preference for speedier process caused the claimant to consequently bypass waiting for background results, again, in order to expedite filling a job assignment. This quick method conflicted with what the operations manager had 'redirected' her to do, which evidenced itself when certain individuals got past the company's screening process.

This constant conflict put Ms. Lemke at odds with both of her superiors. Other employees might have quit over such a quandary. In a situation where one claimant did quit, the court held that conflicting directives from two different supervisors were a basis for quitting with good cause attributable to the employer. *McCunn v. Employment Appeal Board*, 451 N.W.2d 510 (Iowa App. 1989). While Ms. Lemke certainly didn't quit her employment with Spherion Staffing, her employment relationship was certainly terminated over her failure to comply with company policy based on conflicting directives she, too, received from her immediate supervisor and the company operations manager. The record is void of any evidence that she intentionally tried to disregard company policy; rather, she was constantly caught between the proverbial rock and a hard place in making sure her job responsibilities regarding background checks were met. We find any culpability on her part for violating company policy was significantly mitigated by the sometimes inconsistent instruction she received. For this reason, we conclude that the employer failed to satisfy their burden of proof.

#### **DECISION:**

The administrative law judge's decision dated May 13, 2011 is **REVERSED**. The Employment Appeal Board concludes that the claimant was discharged for no disqualifying misconduct. Accordingly, she is allowed benefits provided she is otherwise eligible.

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John A. Peno

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Elizabeth L. Seiser

RRA/lms