**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS**

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

**JILL A BURGETT**
Claimant

**WESTAFF USA INC**
Employer

**APPEAL NO. 06A-UI-11134-DT**

**ADMINISTRATIVE LAW JUDGE DECISION**

**OC: 10/08/06 R: 02**
**Claimant: Respondent (1)**

Section 96.5-1-j – Temporary Employment
871 IAC 24.26(19) – Temporary Employment
Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

Westaff USA, Inc. (employer) appealed a representative's November 2, 2006 decision (reference 01) that concluded Jill A. Burgett (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 December 5, 2006. The claimant participated in the hearing. Dawn Paris appeared on the employer's behalf. During the hearing, Employer's Exhibit One was entered into evidence. 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.

**ISSUE:**

Was there a disqualifying separation from employment either through a voluntary quit without good cause attributable to the employer or through a discharge for misconduct?

**FINDINGS OF FACT:**

The employer is a temporary employment firm. The claimant's first and only assignment began on November 7, 2005. Her last day on the assignment was October 8, 2006. The assignment ended because the employer's business client determined to end it because of her attendance. From January 1, 2006 through August 31, 2006, the claimant had missed approximately 17 days of work, virtually all of which were due to health issues, either illness or injury. She had received a written warning on April 20 that set out a 60-day probationary period, which she successfully completed; on or about August 6 she received an informal warning. On September 4 she suffered a broken collarbone in an automobile accident, resulting in her being off work through September 19; she was released to return and did return to work on September 20. On September 24 she called in an absence as she had reinjured her collarbone in a fall and was in significant pain, for which she took a pain medication that made her very nauseous and drowsy. The final absence was on October 1; she called in an absence that day as she had again reinjured her collarbone and was in pain, and so was again taking the pain medication that made her nauseous and drowsy. On October 6, the business client informed the employer that it wished to end the claimant's assignment due to her attendance; while the employer attempted to contact the claimant to advise her of this prior to the claimant reporting for work on October 8, the attempt had not been successful, so after the claimant

reported for work on October 8 she was sent home and instructed to call Ms. Paris, the employer's placement consultant, who then advised her of the ending of the assignment.

The claimant made application for the assignment on or about October 24, 2005 at the business client's site. On October 31, 2005, the claimant signed an acknowledgment of receipt of the employer's multi-page orientation book containing the employer's policies. Two of the pages of the handbook began with a page captioned "Working at Westaff"; issues discussed on that page included job assignments, use of internet and email at a business client's site, the employer's payroll process, and when to call the employer. In the paragraph regarding calling the employer, an example of a time when an employee was to call the employer was when the employee would know for certain the last day of the assignment or that the employee has just completed the assignment, or when the employee is not on an assignment; "We recommend that you call in available once a week for future assignments. If we don't hear from you, we assume you have Voluntarily Quit and unemployment insurance benefits may be denied."

The employer did not clarify to the claimant that she was eligible for new assignments after the termination of the initial assignment either in the discussion on October 8 or on October 13 when the claimant came in to the employer's office to pick up her paycheck and turn in her items from the assignment; the claimant assumed from the manner of the separation that she was no longer eligible for reassignment through the employer.

**REASONING AND CONCLUSIONS OF LAW:**

The essential question in this case is whether there was a disqualifying separation from employment. The first subissue in this case is whether the employer or the business client ended the claimant's assignment and effectively discharged her for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer or client was right or even had any other choice but 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 questions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988). 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 focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
   a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
   b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
   a. Manifest equal culpability, wrongful intent or evil design; or
   b. Show an intentional and substantial disregard of:
      1. The employer's interest, or
      2. The employee's duties and obligations to the employer.

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.

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.

871 IAC 24.32(7) provides:

> (7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The reason the employer was forced to discharge the claimant from her assignment was her attendance. Absenteeism can constitute misconduct; however, to be misconduct, absences must be both excessive and unexcused. 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 or injury 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. Cosper, supra. Because the final absence was related to properly reported illness, injury, 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 as a result of the termination of the assignment.

The second subissue in this case is whether the claimant voluntarily quit by failing to affirmatively pursue reassignment after October 8, 2006.

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. 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 § 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 § 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 intent of the statute is to avoid situations where a temporary assignment has ended and the claimant is unemployed, but the employer is unaware that the claimant is not working could have been offered an available new assignment to avoid any liability for unemployment insurance benefits. Where a temporary employment assignment has ended and the employer is aware of the end of that assignment, the employer is already on "notice" that the assignment is ended and the claimant is available for a new assignment; where the claimant knows that the employer is aware of the ending of the assignment, she has good cause for not separately "notifying" the employer.

Here, the employer was aware that the business client had ended the assignment; it considered the claimant's assignment to have been completed. Regardless of whether the claimant reported for a new assignment, the separation is deemed to be completion of temporary assignment and not a voluntary leaving; a refusal of an offer of a new assignment would be a separate potentially disqualifying issue.

Further, the general signed acknowledgement that the claimant received the employer's orientation materials does not satisfy the statutory requirement of a "sign(ed) . . .document that provides a clear and concise explanation of the notification requirement." Iowa Code § 96.5-1-j. First, the provision regarding calling the employer when the assignment was completed is only one item amongst a number of other examples of instances in which an employee is to call the employer. Second, even the section regarding calling the employer is only one of several pages of other general employment items, and is not sufficiently "separate" from the general terms of employment. Finally, the language does not specify any specific time frame after the ending of an assignment, such as the three days allowed by the statute, by which the employee is to call in order to avoid being deemed to be a "voluntary quit."

The claimant did not voluntarily quit employment with the employer by failure to seek reassignment after October 8, 2006. Benefits are allowed, if the claimant is otherwise eligible.

**DECISION:**

The representative's November 2, 2006 decision (reference 01) is affirmed. The claimant did not voluntarily quit and the employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/kjw