

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LIONEL LEWIS

Claimant

APPEAL NO. 12A-UI-10621-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

L A LEASING INC

SEDONA STAFFING

Employer

OC: 04/01/12

Claimant: Respondent (2/R)

Section 96.5-1-j – Separation from Temporary Employer

Section 96.5-3-a – Refusal of Suitable Work

STATEMENT OF THE CASE:

Sedona Staffing (employer) appealed a representative's August 24, 2012 decision (reference 03) that concluded Lionel Lewis (claimant) refused an offer of work but was still eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for September 24, 2012. The claimant did not provide a telephone number for the hearing and, therefore, did not participate. The employer participated by Colleen McGuinty, Unemployment Benefits Administrator, and Sammy Teel, Account Manager.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The employer is a temporary employment service. The claimant performed services from June 2000, through June 16, 2012. On March 30, 2007, the employer issued the claimant a written warning for failure to appear for work or notify the employer of his absence on four occasions. He signed a document on October 4, 2011, indicating that he was to contact the employer within three days following the completion of an assignment to request placement in a new assignment. The claimant was given a copy of the document which was separate from the contract for hire. On April 2, 2012, the employer issued the claimant a written warning for being absent more than seven days. On April 24, 2012, the employer issued the claimant a written warning for failure to appear for work and not notifying the employer of the absence. The employer notified the claimant that further infractions could result in termination from employment. On May 10, 2012, the employer verbally notified the claimant that if he were placed again and had any attendance infractions, he would be terminated.

The claimant filed for unemployment insurance benefits with an effective date of April 1, 2012. The claimant completed his last assignment on June 16, 2012, but did not seek reassignment

from the employer. The wages from this work were not reported to Iowa Workforce Development.

On June 25, 2012, the employer contacted the claimant for another assignment but he refused for being unavailable. On July 12, 2012, the claimant accepted an assignment but arrived 40 minutes late and was not allowed to work. On July 30, 2012, the claimant accepted a position but did not appear for the job or let the employer know he would not appear for the job. The claimant did not appear because he was at the dentist's office. The employer terminated the claimant on July 31 2012, for repeated attendance and notification issues.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant is able and available for work. For the following reasons the administrative law judge concludes the claimant was not able and available for work. Before a claimant can be disqualified from receiving unemployment insurance benefits for refusing an offer of suitable work, the claimant must be able and available for work. 871 IAC 24.24(4). The claimant was not able and available for work.

Iowa Code section 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

The work was offered and accepted. The claimant did not appear for work because he was in a dentist's office and not able or available to work. The claimant was not able or available to work on July 30, 2012.

For the reasons that follow the administrative law judge concludes the claimant was discharged for misconduct.

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(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 determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term “absenteeism” also encompasses conduct that is more accurately referred to as “tardiness.” An absence is an extended tardiness, and an incident of tardiness is a limited absence. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

An employer is entitled to expect its employees to report to work as scheduled or to be notified when and why the employee is unable to report to work. The employer has established that the claimant was warned that further unexcused absences could result in termination of employment and the final absence was not excused. The final absence, in combination with the claimant's history of unexcused absenteeism and notification issues, is considered excessive. Benefits are withheld.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

The claimant has received benefits since filing the claim herein. Pursuant to this decision, those benefits may now constitute an overpayment. The issue of the overpayment is remanded for determination as well as the failure to report wages.

DECISION:

The representative's August 24, 2012 decision (reference 03) is reversed. The claimant is not eligible to receive unemployment insurance benefits because the claimant was discharged from work for misconduct. Benefits are withheld until the claimant has worked in and has been paid wages for insured work equal to ten times the claimant's weekly benefit amount provided the claimant is otherwise eligible. The issue of the overpayment is remanded for determination as well as the failure to report wages.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/css