IOWA WORKFORCE DEVELOPMENT UNEMPLOYMENT INSURANCE APPEALS

	68-0157 (9-06) - 3091078 - El
DWIGHT MCDOUGALD Claimant	APPEAL NO: 12A-UI-01039-DT
	ADMINISTRATIVE LAW JUDGE DECISION
MANPOWER INTERNATIONAL INC Employer	
	OC: 12/11/11 Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Dwight McDougald (claimant) appealed a representative's January 27, 2012 decision (reference 02) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with Manpower International, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on February 22, 2012. The claimant participated in the hearing. Lee Ann Gulrud 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?

Was the claimant eligible for unemployment insurance benefits by being able and available for work?

OUTCOME:

Reversed. Benefits allowed.

FINDINGS OF FACT:

The employer is a temporary employment firm. The claimant sought employment with the employer when his prior full-time employment with Agri-Star Meat & Poultry ended in May 2011. The claimant had worked on the third shift with Agri-Star for his entire employment, which had begun in about October 2010. When he discussed potential employment with the employer, he informed the employer that he was only available for third shift work because he had custody of his two children.

The claimant's first and only assignment with the employer began on May 18, 2011. For the first two or three weeks of the assignment, the claimant worked as a packager on the third shift

at the employer's business client's St. Olaf, Iowa location. The work at that site then ended, and he was transferred to the same business client's location in Luana, Iowa. He was told that the work at that site could be on various shifts; he reminded the employer and advised the business client that he could only work third shifts because of his family obligations. He did miss two days of work on the third shift, June 2 and June 3, due to car problems. There is no record he was given any attendance warning for missing those two days of work.

The claimant's last day on the assignment was a third shift that ended on the morning of June 13. He was next scheduled to work a second shift on June 14 and June 15. He believed that from what he had previously told the employer and the business client, they would realize that he would be absent those days because of his family obligations. However, the employer and the business client considered the absences to be no-call, no-shows. The business client then determined to end the claimant's assignment because of his absences. The employer contacted the claimant on June 15 and informed him that the assignment was ended.

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 that 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 that 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. lowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

Excessive unexcused absences can constitute misconduct; however, in order to establish the necessary element of intent, the final incident must have occurred despite the claimant's knowledge that the occurrence could result in the loss of his job. *Cosper*, supra; *Higgins v. IDJS*, 350 N.W.2d 187 (Iowa 1984). The claimant had not been warned that his job was in any jeopardy due to his attendance. The employer asserts that the claimant had not indicated that he was unavailable for any shift other than third shift; however, assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as

shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the claimant's testimony is more credible that he had informed the employer and business client that he could only work the third shift. Under the circumstances of this case, the claimant's absences on June 14 and June 15 cannot be considered unexcused. The employer has not met its burden to show disqualifying misconduct. *Cosper*, supra. The claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

With respect to any week in which unemployment insurance benefits are sought, in order to be eligible the claimant must be able to work, be available for work, and be earnestly and actively seeking work. Iowa Code § 96.4-3. A claimant must remain available for work on the same basis as when his base period wage credits were accrued. 871 IAC 24.22(2)f. The claimant's base period is the third quarter 2010 through the second quarter 2011. Virtually all of the claimant's base period wage credits were earned in third shift work. At least at this time, the claimant's availability restriction to third-shift work is not unduly limiting his availability. 871 IAC 22(2)(a). Benefits are allowed, if the claimant is otherwise eligible.

DECISION:

The representative's January 27, 2012 decision (reference 02) is reversed. The employer did discharge the claimant, but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Lynette A. F. Donner Administrative Law Judge

Decision Dated and Mailed

ld/kjw