

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

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**TINO A JOHNSON**

Claimant

and

**SEDONA STAFFING INC**

Employer

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**HEARING NUMBER: 21B-UI-13160**

**EMPLOYMENT APPEAL BOARD  
DECISION**

**NOTICE**

**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:** 96.6-2, 24.35

**DECISION**

**UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE**

The Employer appealed this case to the Employment Appeal Board. Two members of the Employment Appeal Board reviewed the entire record. With the following modification, the majority members of the Appeal Board find the administrative law judge's decision is correct. The administrative law judge's Findings of Fact and Reasoning and Conclusions of Law are adopted by the Board as its own. The administrative law judge's decision is **AFFIRMED** with the following **MODIFICATION**:

The Board adds the following to the Reasoning and Conclusions of Law:

Taking up the more recent job separation first we affirm on a slightly different basis. Our reasoning is that in 2021, after the assignment loss, either the Claimant was an employee of Sedona, or he was not. Since he promptly requested reassignment, his loss of assignment cannot be deemed a quit. This would make it a layoff, and that is not disqualifying. If, then, the job separation took place at assignment loss the Claimant would not be disqualified for the loss of assignment/job. In that case the drug test issue would not be disqualifying either. Why? Because the Claimant would not have been an employee at the time he took the test. Thus he was not “discharged for misconduct,” – he wasn’t discharged at all. There would be no basis to disqualify if the assignment loss meant the Claimant was no longer an employee either.

On the other hand, if the Claimant was still an employee at the time of testing then the Administrative Law Judge's approach is correct. Under the Code a "prospective employee" is "a person who has made application, whether written or oral, to an employer to become an employee" whereas an "employee" is a "person in the service of an employer." Iowa Code §730.5(1)(2021). Assuming the Claimant was working for Sedona at the time of the job loss, then the Claimant was clearly fired by Sedona over the drug test failure. One does not fire a prospective employee. You "refuse to hire" a prospective employee. If the assignment loss was *not* the same as job loss then the Claimant at the time of the adverse employment action in question was an employee, not a prospective employee. In that case the drug test would not be authorized, as explained by the Administrative Law Judge.

No matter how you slice it the most recent separation was not disqualifying.

We now turn to the older job loss. That part of the case involves a voluntary quit. Iowa Code Section 96.5(1) states:

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.

Even where a claimant quits but without good cause attributable to the employer the claimant may nevertheless collect benefits under certain circumstances. One of these is where the quit is for the purpose of accepting other employment. On this issue the Code provides:

- a. The individual left employment in good faith for the sole purpose of accepting **other** or better **employment**, which the individual did accept, and the individual performed services in the new employment. **Benefits relating to wage credits earned with the employer that the individual has left shall be charged to the unemployment compensation fund.** This paragraph applies to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

Iowa Code §96.5(1)(a). The rules of Workforce further explain:

The claimant shall be eligible for benefits even though the claimant voluntarily quit if the claimant left for the sole purpose of accepting an offer of other or better employment, which the claimant did accept, and from which the claimant is separated, before or after having started the new employment. The employment does not have to be covered employment and does not include self employment.

871 IAC 24.28(5).

As found by the Administrative Law Judge the Claimant did earn wages at the new job which he quit to take. This being the case the Claimant is **not** disqualified under Iowa Code §96.5(1)(a), as the Administrative Law Judge correctly found.

**But**, since Sedona was the employer whom the Claimant quit in order to take another job under the law **Sedona's account may not be charged** with benefits paid to the Claimant. Iowa Code §96.5(1)(a); 871 IAC 23.43(5)(no charge to prior employer when quit for other or better job).

We note that the second round of employment, including the rehire and the discharge, all took place during the benefit year. The credits earned during this period of time is not in the base period of the current claim, and so we can safely relieve Sedona of all charges on the current claim.

The upshot is the Claimant gets benefits but Sedona does not have to pay for them.

**DECISION:**

The administrative law judge's decision dated September 11, 2020 is **MODIFIED IN THE EMPLOYER'S FAVOR WITH NO EFFECT ON THE CLAIMANT**. The Employment Appeal Board concludes the Claimant **is allowed benefits provided** the Claimant is otherwise eligible.

**Benefits relating to wage credits earned with the Employer shall be charged to the unemployment compensation balancing fund under the authority of Iowa Code §96.5(1)(a).**

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James M. Strohman

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Myron R. Linn

RRA/fnv