IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

NICHOLE A PERRY Claimant **EXPRESS SERVICES INC** Employer	**APPEAL NO. 20A-UI-01561-JTT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 01/26/20** **Claimant: Respondent (5)**

Iowa Code Section 96.5(1)(j) – Separation from Temporary Employment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the February 13, 2020, reference 03, decision that allowed benefits to the claimant provided she met all other eligibility requirements and that held the employer's account could be charged for benefits. After due notice was issued, a hearing was held on March 9, 2020. Claimant Nichole Perry participated. Julie Anderson represented the employer. The administrative law judge took official notice of the following Agency administrative records: DBRO, WAGE-A and the February 18, 2020, reference 04, decision. The administrative law judge took official notice of the materials submitted for and created in connection with the fact-finding interview for the limited purpose of determining whether the employer participated in the fact-finding interview and whether the claimant engaged in fraud or intentional misrepresentation in connection with the fact-finding interview.

ISSUES:

Whether the claimant was discharged from her temporary work assignment for misconduct in connection with the assignment.
Whether the claimant's separation from the temporary employment agency was for good cause attributable to the employer.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Express Services, Inc. is a temporary employment agency. Nichole Perry was employed by the Mason City branch. At the time Ms. Perry signed up for work with Express Services, the employer had her sign for a handbook that included a requirement that she contact Express Services within three working days of completing and assignment. The policy statement did not mention potential disqualification for unemployment insurance benefits if Ms. Perry failed to contact the employer within the required timeframe. The employer did not have Ms. Perry sign a stand-alone policy statement. In December 2018, Express Services placed Ms. Perry in a part-time, temporary custodial work assignment at North Iowa Area Community College (NIACC). Ms. Perry's work hours in the assignment were 5:00 a.m. to 9:00 a.m., Monday through Friday. Dave Trunkhill, NIACC Custodian Supervisor, was Ms. Perry's supervisor in the assignment.

Ms. Perry began the assignment on December 10, 2018 and last performed work in the assignment on February 5, 2019.

On February 6, 2019, Ms. Perry went to NIACC at her scheduled start time, but advised Mr. Trunkhill she could not stay because she needed to take her infant child to the emergency room. Ms. Perry discovered her child had a temperature as she prepared to take the child to daycare that morning prior to reporting for work. Ms. Perry left her infant child in her vehicle as she spoke with Mr. Trunkhill. The employer's attendance policy required that Ms. Perry notify Express Services and NIACC prior to the start of her shift if she needed to be absent. Ms. Perry had not notified Express Services or NIACC prior to the scheduled start of her shift on February 6, 2019. On that same day, Mr. Trunkhill notified Express Services that NIACC was terminating Ms. Perry's assignment due to attendance. Ms. Perry had been absent on January 23, 2019 with proper notice. The employer did not document the reason for the absence and Ms. Perry cannot recall the reason for the absence. Ms. Perry had been absent on January 28, 2019 with proper notice so that she could attend a medical appointment. Ms. Perry provided a medical excuse to Express Services in support of her need to be absent.

On January 6, 2019, Express Services Account Specialist Rob Kraft notified Ms. Perry that the NIACC assignment was ended. Termination of the assignment did not disqualify Ms. Perry from being considered for additional work assignments. Ms. Perry did not ask for an additional assignment and did not again contact Express Services until November 2019. Instead, Ms. Perry began new employment on February 9, 2019. The new employment was with employer Prestige Maintenance U.S.A. (employer account number 513701) and continued in that employment until February 25, 2019. Ms. Perry's wages from the Prestige Maintenance U.S.A. employment totaled $817.00. Ms. Perry subsequently performed work for another employer, Mason City Lodging Partners, L.L.C., for which she was paid $373.00 in wages during the fourth quarter of 2019.

Ms. Perry established an original claim for unemployment insurance benefits that was effective January 26, 2020. Iowa Workforce Development set Ms. Perry's weekly benefit amount at $86.00. Express Services is a base period employer for purposes of the claim year that began for Ms. Perry on January 26, 2020. Ms. Perry's wages for the period following her separation from Express Services and prior to her January 26, 2020 unemployment insurance claim exceeded 10 times her $86.00 weekly benefit amount.

REASONING AND CONCLUSIONS OF LAW:

The administrative law judge will first consider whether termination of the work assignment for attendance disqualified Ms. Perry for unemployment insurance benefits.

Iowa Code section 96.5(2)(a) provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See *Lee v. Employment Appeal Board*, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also *Greene v. EAB*, 426 N.W.2d 659, 662 (Iowa App. 1988).

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. See 871 IAC 24.32(4).

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's *unexcused* absences were excessive. See Iowa Administrative Code rule 871-24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See Iowa Administrative Code rule 871-24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form

of absence. See *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984). Employers may not graft on additional requirements to what is an excused absence under the law. See *Gaborit v. Employment Appeal Board*, 743 N.W.2d 554 (Iowa Ct. App. 2007). For example, an employee's failure to provide a doctor's note in connection with an absence that was due to illness properly reported to the employer will not alter the fact that such an illness would be an excused absence under the law. *Gaborit*, 743 N.W.2d at 557.

The discharge from the assignment was not based on misconduct in connection with the employment. The evidence in the record establishes an unexcused absence on February 6, 2019. The absence was based on Ms. Perry's need to get medical care for her infant, but she did not properly report the absence to her employer or to NIACC prior to the start of her shift. The evidence establishes an excused absence on January 28, 2019, when Ms. Perry was absent to attend a medical appointment and provided proper notice. The evidence fails to prove an unexcused absence on January 23, 2019, when Ms. Perry was absent with proper notice and due to a reason the employer did not document and Ms. Perry cannot recall. The discharge from the assignment would not disqualify Ms. Perry for unemployment insurance benefits.

Iowa Code section 96.5(1)(j) provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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. (1) 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.
>
> (2) 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.
>
> (3) For the purposes of this paragraph:
>
> (a) "Temporary employee" means an individual who is employed by a temporary employment firm to provide services to clients to supplement their workforce during absences, seasonal workloads, temporary skill or labor market shortages, and for special assignments and projects.
> (b) "Temporary employment firm" means a person engaged in the business of employing temporary employees.

Iowa Admin. Code r. 871-24.26(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 section 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 section 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 evidence in the record establishes a February 6, 2019 separation that was for good cause attributable to the employer. The employer's end-of-assignment notification policy did not comply with the applicable statute. The policy was silent on the unemployment insurance consequences or failing to contact the employer within three working days of the completion of the assignment. The policy was part of a handbook, rather than presented to Ms. Perry as a stand-alone policy. Because the employer did not comply with Iowa Code section 96.5(1)(j), subsection (j) does not apply to Ms. Perry's employment. Ms. Perry completed her obligation to the employer when she completed the work the employer and NIACC had for her in the assignment. Ms. Perry was under no obligation to see future assignments through Express Services. Ms. Perry is eligible for benefits provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The February 13, 2020, reference 03, decision is modified as follows. The claimant's February 6, 2019 separation from the temporary employment agency was for good cause attributable to the temporary employment agency. The claimant is eligible for benefits provided she is otherwise eligible. The employer's account may be charged for benefits.

_____
James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

jet/scn