IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

LINDA L TOMSON
607 E OAK
SALEM IA 52649

ADECCO USA INC
C/O TALX UC EXPRESS
PO BOX 66736
ST LOUIS MO 63166-6736

Appeal Number: 04A-UI-09049-DT
OC: 07/18/04 R: 04
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

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

STATEMENT OF THE CASE:

Adecco USA, Inc. (employer) appealed a representative's August 10, 2004 decision (reference 01) that concluded Linda L. Tomson (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 September 14, 2004. The claimant participated in the hearing. Cris Scheibe of TALX eXpress appeared on the employer's behalf and presented testimony from one witness, Christiana Ball. 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?

FINDINGS OF FACT:

The employer is a temporary employment firm. The claimant had only one assignment that began June 12, 2002. She worked full time as an electronic assembler at the employer's business client. Her last day on the assignment was May 14, 2004. The assignment ended because the employer's business client determined to end it because of an incident on May 14.

When the claimant had been placed on the assignment, she understood that it was not a temp-to-hire position. However, by May 14 the claimant learned that the business client was directly hiring some other temporary employees, including some that had been on the assignment for less time than she. She became somewhat disgruntled. Other employees became aware that she was upset and suggested to the supervisor that he should talk to the claimant. At the end of the workday, the supervisor asked the claimant to stay and talk. He asked her what was bothering her, and she told him she did not feel it was fair that other temporary employees were being hired who had been on the assignment for less time than she. He told her that part of the reason the other temporary employees were being hired was that they had worked on other shifts and had worked in different areas of the assembly plant. The claimant responded that this was also not fair, as she had never been given an opportunity to work on other shifts or other areas and would have been willing to do so if she had known it might improve her chances of being hired on permanently. When the supervisor indicated that there was nothing more he could do, she told him she would not be in at work on May 17 as she was going to take the day to start looking for another position.

The morning of May 17, the business client supervisor called the employer by approximately 7:50 a.m. and informed the employer that the claimant would not be allowed to return to the assignment because of allegedly making a "scene" on May 14. Ms. Ball, the employer's office supervisor, spoke to the claimant and informed her that the business client was ending the assignment. The claimant denied that there was a "scene," that she had simply responded to the supervisor's questions and statements to her. The claimant later brought in to the employer her work items she had had from the business client. She assumed that her overall employment with the employer was also terminated and did not check in with the employer for other assignments. She had signed a commitment sheet that included, among other provisions, the statement that she was to "contact Adecco within 48 hours of completion of each assignment. Failure to contact us may result in a voluntary quit and/or the loss of unemployment benefits."

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 decisions. 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 section 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 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(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 Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The reason the employer was forced to discharge the claimant from her assignment was the allegation that she had caused a "scene." However, the claimant denied causing a "scene." No first-hand witness was available at the hearing to provide testimony to the contrary under oath and subject to cross-examination. The employer relies exclusively on the second-hand account from the client's supervisor; however, without that information being provided first-hand, the administrative law judge is unable to ascertain whether the supervisor is credible or whether the employer's witnesses might have misinterpreted or misunderstood aspects of his report. Under the circumstances, the administrative law judge finds the claimant's first-hand information more credible. Under the circumstances of this case, the claimant's acknowledgement to the supervisor that she was unhappy about not being hired permanently was, at worst, result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence in an isolated instance, and was a good faith error in judgment or discretion. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute.

The second subissue in this case is whether the claimant voluntarily quit.

Iowa Code section 96.5-1 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.

871 IAC 24.25 provides that, in general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. Bartelt v. Employment Appeal Board, 494 N.W.2d 684 (Iowa 1993). The employer suggested that the claimant had indicated that she was quitting the assignment by indicating to the supervisor that she would not be at work on May 17 because she would be looking for other work. Simply admitting that one is looking for another job is not paramount to quitting. The administrative law judge concludes that the employer has failed to satisfy its burden that the claimant voluntarily quit by her statements on May 14 and her absence on May 17. Iowa Code section 96.6-2.

The employer also asserts that the claimant quit by failing to maintain contact with the employer and seek reassignment after May 17.

Iowa Code section 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.

First, the statute requires that "the document (that provides a clear and concise explanation of the notification requirement and the consequences of a failure to notify) shall be separate from any contract of employment." The provision in the employer's "commitment sheet" is buried within many other mandates in a document that is virtually a "contract of employment," and does not appear to met the requirements of the statute to be "separate." Further, 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. The statute does not require that a claimant seek reassignment, it only requires that the employer have "notice" of the end of the assignment.

Here, the employer was aware that the business client had terminated the assignment; it considered the claimant's assignment to have been completed, albeit unsuccessfully. 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. Benefits are allowed, if the claimant is otherwise eligible.

DECISION:

The representative's August 10, 2004 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. The employer's account is not subject to charge in the current benefit year.

ld/tjc