IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JEFF J PIERCE Claimant **KELLY SERVICES INC** Employer	**APPEAL NO. 07A-UI-08636-DT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 08/05/07 R: 02** **Claimant: Respondent (1)**

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Kelly Services, Inc. (employer) appealed a representative's September 4, 2007 decision (reference 01) that concluded Jeff J. Pierce (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 25, 2007. The claimant failed to respond to the hearing notice and provide a telephone number at which he could be reached for the hearing and did not participate in the hearing. Jessica Triinidad appeared on the employer's behalf. Based on the evidence, the arguments of the employer, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The employer is a temporary employment firm. The claimant began his first and only assignment through the employer on September 15, 2006, working full time as a production worker. His last day on the assignment was July 31, 2007. The assignment ended because the business client would not allow the claimant to continue in his assignment due to the results of a background check.

When the claimant had applied with the position through the employer he had completed a form which asked if he had any criminal convictions within the past seven years. He had answered "no." The employer had a background check run on the claimant in September 2006 and no negative results were returned, and the claimant was placed into the assignment. In January 2007 the employer's business client modified its background check screening requirements. On May 2, 2007 a new background check was run on the claimant. The employer could not establish when the results of that check were returned, but assumed in was in July. No explanation was offered as to why the results took so long to be returned after the May 2007 run. The results of the May 2007 background check showed that the claimant had a May 5, 2006 guilty conviction for possession of drug paraphernalia in an Iowa state jurisdiction. The

September 2006 background check was supposed to have covered state convictions. The employer could not explain why the September 2006 background check had not shown the May 2006 conviction.

The claimant was no longer eligible to continue working in his assignment with the conviction for drug paraphernalia, so his assignment was terminated.

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).

Iowa Code § 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.

871 IAC 24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

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.

Henry, supra. The reason cited by the employer for discharging the claimant is his May 5, 2006 drug paraphernalia conviction. While if timely caught the claimant's failure to report the conviction might have been a basis for a finding of misconduct, in this case there is no current act of misconduct as required to establish work-connected misconduct. 871 IAC 24.32(8); Greene v. Employment Appeal Board, 426 N.W.2d 659 (Iowa App. 1988). The conviction occurred over a year prior to the employer's discharge of the claimant, and was not discovered until more than ten months after the employer ran the first background check which should have disclosed the conviction. The claimant cannot be held to fault by the failure on the part of the employer's process to discover a conviction that had been issued over four months before the first background check was run. Further, the employer's or the employer's agent's delay between the May 2, 2007 running of the new background check and the July 31, 2007 discharge further contributes there not being an inappropriate action on the part of the claimant being current. While the employer had a good business reason for discharging the claimant, it 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, and the claimant is not disqualified from benefits.

DECISION:

The representative's September 4, 2007 decision (reference 01) is affirmed. 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.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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