

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

**SUSAN J AMSBARY**  
Claimant

**APPEAL NO. 18A-UI-06767-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**KELLY SERVICES INC**  
Employer

**OC: 05/20/18**  
**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 June 14, 2018, reference 01, decision that allowed benefits to the claimant provided she was otherwise eligible and that held the employer's account could be assessed for benefits, based on the Benefits Bureau deputy's conclusion that the claimant was discharged on May 21, 2018 for no disqualifying reason. After due notice was issued, a hearing was held on July 9, 2018. Claimant Susan Amsbary participated. Trisia Montry represented the employer. Exhibits 1, 2 and 3 were received into evidence. The administrative law judge took official notice of the Agency's administrative record of benefits disbursed to the claimant. The materials from the June 8, 2018 fact-finding interview were not available to the administrative law judge at the time of the July 9, 2018 appeal hearing.

**ISSUES:**

Whether the claimant was discharged from her work assignment for misconduct in connection with the employment.

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: Kelly Services, Inc. is a temporary employment agency. Susan Amsbary commenced her employment with Kelly Services in 2015 and performed work in multiple long-term, part-time work assignments as a docent at the John Deere museum in Waterloo. On May 21, 2018, Kelly Services discharged Ms. Amsbary from the assignment for allegedly refusal to follow a supervisor's directive on May 7, 2018. Ms. Amsbary had not refused to follow a directive and had instead only asked questions of the supervisor regarding John Deere representative's decision to subject the museum docents to additional review. On May 21, 2018, a Kelly Services representative notified Ms. Amsbary that the assignment at the John Deere museum was ended and mentioned to Ms. Amsbary that she could inquire at the Kelly Services Waterloo branch office regarding additional assignments. Ms. Amsbary did not immediately request a

new assignment. After the June 8, 2018 fact-finding interview, Ms. Amsbary did make contact with the Kelly Services Waterloo branch office regarding additional assignments.

In connection with Ms. Amsbary's start with Kelly Services in 2015, the employer generated a policy "Agreement" document containing many Kelly Services policies. The document utilizes an exceptionally small font. The document included the following:

Assignment Information and Employment Termination Policy

Within 48 hours of completion of each assignment, I will notify Kelly of my availability for work. I understand I am responsible for maintaining weekly contact with Kelly; failure to contact Kelly may affect my eligibility for unemployment benefits.

The policy statement section sets forth several additional requirements. Ms. Amsbary did not sign the document. It is unclear whether Ms. Amsbary received a copy of the document during the employment.

**REASONING AND CONCLUSIONS OF LAW:**

The administrative law judge will first address the discharge from the assignment at the John Deere museum.

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).

Continued failure to follow reasonable instructions constitutes misconduct. See *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See *Woods v. Iowa Department of Job Service*, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See *Endicott v. Iowa Department of Job Service*, 367 N.W.2d 300 (Iowa Ct. App. 1985).

The evidence in the record establishes that the discharge from the assignment was not based on misconduct in connection with the employment. Ms. Amsbary had not refused a reasonable directive and had not knowingly engaged in any other conduct contrary to the interests of Kelly Services or John Deere. Accordingly, the discharge from the assignment would neither disqualify Ms. Amsbary for benefits nor relieve the employer's account of liability for benefits.

The administrative law judge will now further address Ms. Amsbary's separation from the temporary employment agency.

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 employer's end-of-assignment policy does not comply with the requirements of Iowa Code section 96.5(1)(j). The policy is buried in a full page of very small font text. The policy states an end-of-assignment contact policy inconsistent with the requirements of the statute. There is no proof that Ms. Amsbary read or signed the policy. There is no proof the employer delivered the policy statement to Ms. Amsbary. In the absence of compliance with the statute, the statute cannot be applied to Ms. Amsbary's employment relationship with Kelly Services and Ms. Amsbary would be under no obligation to seek further work through the employer after completing the assignment on John Deere effective May 21, 2018.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Amsbary's May 21, 2018 separation from the temporary employment agency was for good cause attributable to the temporary employment agency. Ms. Amsbary is eligible for benefits provided she is otherwise eligible. The employer's account may be charged for benefits.

**DECISION:**

The June 14, 2018, reference 01, decision is modified as follows. The claimant was discharged from a temporary work assignment on May 21, 2018 for no disqualifying reason. The claimant's May 21, 2018 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.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs