

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KELLY BENNETT

Claimant

APPEAL NO: 16A-UI-10635-JE-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

EXPRESS SERVICES INC

Employer

OC: 08/21/16

Claimant: Respondent (1)

Section 96.5-2-a – Discharge/Misconduct

Section 96.5(1)j – Voluntary Leaving (Temporary Employment)

STATEMENT OF THE CASE:

The employer filed a timely appeal from the September 22, 2016, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on October 13, 2016. The claimant participated in the hearing. Tiffany Mills, Staffing Consultant, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct and whether the claimant sought reassignment from the employer.

FINDINGS OF FACT:

The claimant was employed as a full-time packaging employee for Express Services last assigned at Klein Tools from October 16, 2014 to August 20, 2016. She completed the assignment when the client instructed the employer it did not want her to return to work August 20, 2016.

The client has a zero tolerance for smoking on company property policy and the claimant was aware of the policy. On August 20, 2016, the claimant went to break around 9:00 a.m. and went to her car where she removed a cigarette from the pack as she was getting ready to pull out of her parking spot and leave the employer's property to smoke. She did not light the cigarette before exiting the employer's property. A client employee, "Todd," walked up to the claimant's car and knocked on her window. He stated she was not "supposed to be smoking in her car" and she told him her cigarette was not lit. He then said, "You think you're so much better than everybody else and you're nothing but a bitch." The claimant told him to "back off." She then left the property for her break and when she returned she observed Todd talking to her supervisor. After Todd walked away the claimant went to her supervisor and said, "I suppose you want my badge" and her supervisor asked if she was smoking. The claimant told him it was unlit but her supervisor took her badge and walked her out of the building. The claimant asked for a written warning or suspension rather than the loss of her job but her supervisor stated the

employer had a zero tolerance policy. The claimant had not received any verbal or written warnings about smoking.

On August 22, 2016, the employer spoke to the claimant about the incident and she denied smoking on the employer's property. Todd also told the client that the claimant told him to "fuck off" in the parking lot. The claimant denied that allegation as well. The claimant asked if she could get her job back and the employer told her she could not return.

On August 23, 2016, the claimant called the employer to ask about her vacation time and asked about getting her job back. On August 24, 2016, the employer again told the claimant she could not have her job back and instructed her to only contact the employer with questions or concerns and not to call the client. On August 24 or 25, 2016, the claimant asked the employer for another assignment.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for no disqualifying reason and did seek reassignment from the employer.

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.

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).

Iowa Code § 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. (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.

The claimant knew smoking on the client's property was strictly prohibited and did not light a cigarette in the employer's parking lot August 20, 2016. She did have an unlit cigarette in her hand when Todd came up to her window and they exchanged words with him calling her a "bitch" and her telling him to "fuck off" but she did not violate the employer's no smoking policy. Consequently, the administrative law judge finds the employer has not established misconduct on the part of the claimant as defined by Iowa law.

The remaining issue is whether the claimant sought reassignment from the employer. While the employer's policy requires employees to seek reassignment from the employer within three days after the end of the assignment, the purpose of the statute is to provide notice to the temporary employment firm that the claimant is able and available for work. In this case, the claimant contacted the employer August 22 through August 25, 2016, and after realizing the client was not going to relent and let her return to that assignment she asked for another assignment either August 24 or 25, 2016. The employer has not established that phone call did not occur on the third business day following the completion of the assignment. That

conversation satisfied the reason for the rule because the employer knew at that time the claimant was able and available and wanted another assignment.

DECISION:

The September 22, 2016, reference 01, decision is affirmed. The claimant's separation from employment was attributable to the employer. Benefits are allowed provided the claimant is otherwise eligible.

Julie Elder
Administrative Law Judge

je/rvs