

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

JAMES C PRESAR

Claimant

APPEAL NO. 18A-UI-10469-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KELLY SERVICES GLOBAL LLC

Employer

OC: 09/16/18

Claimant: Appellant (2)

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

Iowa Code Section 96.5(2)(a) - Discharge

STATEMENT OF THE CASE:

James Presar filed a timely appeal from the October 15, 2018, reference 02, decision that disqualified him for benefits and that relieved the employer's account of liability for benefits, based on the Benefits Bureau deputy's conclusion that Mr. Presar voluntarily quit on July 26, 2018 by failing to contact the temporary employment firm within three working days of the completion of an assignment after having been told in writing of his obligation to make such contact. After due notice was issued, a hearing was held on November 2, 2018. Mr. Presar participated. Christopher Lalla represented the employer. Exhibit A and Department Exhibit D-1 were received into evidence.

ISSUES:

Whether Mr. Presar was discharged from the John Deere temporary work assignment for misconduct in connection with the assignment.

Whether Mr. Presar voluntarily quit his employment with Kelly Services Global, L.L.C. without good cause attributable to the employer by failing to contact the temporary employment firm within three working days of completion of an assignment to request a new assignment, after having been told in writing of his obligation to make such contact.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Kelly Services Global, L.L.C. is a temporary employment agency headquartered in Michigan. Kelly Services recruited Mr. Presar for a full-time temporary work assignment at a John Deere production facility in Waterloo. Mr. Presar began the assignment on April 9, 2018. At the time, Mr. Presar became an employee of Kelly Services, the temporary employment firm had Mr. Presar sign various documents. Those documents did not include a stand-alone policy statement that obligated Mr. Presar to contact Kelly Services within three days of completing a work assignment to request placement in a new assignment or be deemed to have voluntarily quit and risk being disqualified for unemployment insurance benefits. Mr. Presar completed the

John Deere assignment on July 26, 2018, when his supervisor and manager ended the assignment due to alleged time-keeping fraud. Mr. Presar had not in fact intentionally misreported his time and the time reporting errors had arisen from miscommunication. Kelly Services did not conduct an investigation of the alleged time-keeping fraud. On July 26, 2018, Mr. Presar contacted Kelly Services in an attempt to resolve the issues related to the John Deere assignment so that he could return to the assignment and, in the alternative, to request placement in a new assignment. Mr. Presar spoke directly with a Kelly Services representative on July 26 and/or July 27, 2018 and commenced simultaneous email correspondence with Kelly Services. Mr. Presar was not allowed to return to the John Deere assignment and Kelly Services did not provide Mr. Presar with an additional assignment. Mr. Presar's correspondence with Kelly Services continued until August 14, 2018. On that day, Kelly Services confirmed Mr. Presar's eligibility for additional work and directed him to contact the closest Kelly Services office and review Kelly Services Internet job postings.

REASONING AND CONCLUSIONS OF LAW:

The administrative law judge will first address whether Mr. Presar was discharged from the John Deere assignment for misconduct in connection with the assignment.

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).

The weight of the evidence in the record establishes that Mr. Presar's discharge from the John Deere assignment was not based on misconduct in connection with the assignment/employment. The employer presented insufficient evidence and insufficiently direct and satisfactory evidence to prove misconduct in connection with the assignment. The evidence in the record regarding the basis for the assignment coming to an end consists primarily of Exhibit A, Mr. Presar's email correspondence with Kelly Services personnel concerning the alleged time-keeping fraud and Mr. Presar's testimony. The correspondence makes clear that the time-keeping issue arose from miscommunication and limits in conflicting time-keeping systems, rather than from wrong intent on the part of Mr. Presar. The discharge from the John Deere assignment would not disqualify Mr. Presar for unemployment insurance benefits.

The administrative law judge will next address Mr. Presar's "separation" from Kelly Services.

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 weight of the evidence in the record establishes a July 26, 2018 separation that was for good cause attributable to Kelly Services Global. The evidence fails to establish that Kelly Services complied with the requirements of Iowa Code section 96.5(1)(j), which required the employer to have Mr. Presar read and sign a document that set forth in clear and concise language an obligation to contact Kelly Services within three working days of completing an assignment to request placement in a new assignment or be deemed to have voluntarily quit and risk being disqualified for unemployment insurance benefits. The evidence also fails to establish that the employer provided Mr. Presar with any such policy statement document. In the absence of evidence indicating that the employer complied with the statute, the statute would not apply to this employment relationship and cannot serve as a basis for disqualifying Mr. Presar for benefits. Mr. Presar fulfilled his obligation to Kelly Services when the John Deere assignment ended and was under no obligation to seek further assignments through Kelly

Service. Even Iowa Section 96.5(1)(j) would have applied, Mr. Presar contacted Kelly Services less than three days after the end of the John Deere assignment to request further work. Mr. Presar is eligible for benefits provided he is otherwise eligible. The employer's account may be charged.

DECISION:

The October 15, 2018, reference 02, decision is reversed. The claimant was discharged from a temporary work assignment on July 26, 2018 for no disqualifying reason. The claimant's July 26, 2018 separation from the temporary employment agency was for good cause attributable to the temporary employment agency. The claimant is eligible for benefits provided he is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs