IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

SHAWN R HARRIS
Claimant

KELLY SERVICES INC
Employer

APPEAL NO. 14A-UI-02648-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/19/14
Claimant: Appellant (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.5(1)(j) – Separation from Temporary Employment
Iowa Code Section 96.5(3)(a) – Refusal of Suitable Work

STATEMENT OF THE CASE:

Shawn Harris filed a timely appeal from the February 27, 2014, reference 03, decision that disqualified him for unemployment insurance benefits based on an agency conclusion that he had refused to accept suitable work with Kelly Services on February 3, 2014. After due notice was issued, a hearing was held on April 1, 2014. Mr. Harris participated. Lori Smith represented the employer. The administrative law judge took official notice of the agency's administrative record concerning the claimant's average weekly wage during his highest earning base period quarter.

ISSUES:

Whether the claimant separated from the work assignment or from the employment for a reason that disqualifies him for unemployment insurance benefits.

Whether the claimant refused an offer of suitable employment on or about February 3, 2014 without good cause.

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. Shawn Harris began his most recent work assignment through Kelly services in May 2013 and last performed work in that assignment on January 23, 2014. The assignment was a full-time temporary work assignment at Raining Rose, a manufacturing facility located in Cedar Rapids. Mr. Harris had earlier performed work in a short-term work assignment at the same location. The work hours in the most recent assignment were 3:15 p.m. to 11:30 or 11:45 p.m., Monday through Friday, with occasional weekend hours. The assignment paid $10.00 per hour. The client business ended the assignment on January 23, 2014, ostensibly for a violation of the client business's cell phone policy and an alleged decrease in Mr. Harris's work performance. While in the assignment, Mr. Harris had applied for employment with Raining Rose, but was not hired. The cell phone

violation occurred about a month before the client business ended the assignment. The client business allowed workers to listen to music in their work area. Mr. Harris used his cell phone to play music in his work area. A human resources representative observed the cell phone in the work area and directed Mr. Harris to put the phone away. Mr. Harris complied and thereafter did not take his cell phone to the production floor.

On January 23, 2014, the client business notified Kelly Services that it was ending the assignment. On that same day, Kelly Services recruiter Megan Erhart notified Mr. Harris that the assignment was ended. Kelly Services deemed Mr. Harris eligible for placement in other assignments, but did not have another assignment immediately available for Mr. Harris. During the assignment, Mr. Harris had worn a hernia belt because of an umbilical hernia. That condition did not prevent Mr. Harris from being able to perform assigned duties

Kelly Services has a written end-of-assignment notification policy that requires employees to contact the employer within three working days of the completion of an assignment to seek reassignment. The employer's policy indicated that failure to make the required contact would lead the employer to conclude the employee had quit. The policy did not specifically state the impact of a voluntary quit on unemployment insurance benefit eligibility. Mr. Harris had signed the policy in March 2013. The employer does not know if Mr. Harris received a copy of the notification policy.

On January 24, 2014, Ms. Erhart sent Mr. Harris materials he needed to participate in a skills assessment exercise. Mr. Harris complied with that request to the best of his ability.

On February 3, 2014, a Kelly Services representative spoke to Mr. Harris by telephone concerning an available assignment in North Liberty. The distance from Cedar Rapids to North liberty is approximately 20 miles. The representative told Mr. Harris that the hours of the assignment would be 3:30 p.m. to midnight, Monday through Friday, that the hourly wage would be $9.50, that the assignment would start on February 5, 2014, and that the work would involve production of parts for Whirlpool appliances. Mr. Harris rejected the offer of employment based on the commuting distance. Mr. Harris said the assignment location and hours would conflict with his need to drop his fiancée off at Raining Rose. Mr. Harris' fiancée's work hours were 3:00 p.m. to 11:30 p.m. Mr. Harris was also concerned that his fiancée's 2000 Dodge Caravan would not be a reliable commuting vehicle. Mr. Harris asked the Kelly Services representative whether they had anything available in Cedar Rapids, but the employer did not have any work for him in Cedar Rapids at that time.

At the time Mr. Harris had established his employment with Kelly Services, he had completed an application that indicated he had a car and that he was available for work within a 20-mile radius of his home in Cedar Rapids. However, all of the work that Mr. Harris performed for Kelly services was performed in the Cedar Rapids area.

Mr. Harris established a claim for unemployment insurance benefits that was deemed effective January 19, 2014 in response to his assignment at Raining Rose being ended. Mr. Harris's base period consists of the fourth quarter of 2012 and the first, second, and third quarter of 2013. Mr. Harris had no wages during the third quarter 2013. His highest earning quarter during the base period was the second quarter of 2013, when his total wages were $3,935.15 and his average weekly wage was $302.70.

REASONING AND CONCLUSIONS OF LAW:

The administrative law judge will first address the client business's decision to discharge Mr. Harris from the assignment.

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.

The employer has the burden of proof in a discharge 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). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The evidence in the record fails that the discharge from the assignment was based on misconduct in connection with the employment. The cell phone incident had occurred a month prior to the assignment coming to an end and had been an isolated incident. Mr. Harris did not repeat the conduct. The cell phone incident was no longer a current act at the time the assignment came to an end. The employer's allegation that Mr. Harris' work performance had suffered after the client business did not hire him does not rise above an allegation. The employer has presented insufficient evidence, either through testimony from persons with personal knowledge or otherwise, to establish that Mr. Harris's work performance did indeed diminish. The employer appears to have acknowledged that Mr. Harris's separation from the assignment was not based on misconduct through the employer's election to seek a new assignment for him. The separation from the work assignment would not disqualify Mr. Harris for unemployment insurance benefits.

The administrative law judge will next address the issue of Mr. Harris's contact with the employer immediately following the completion of the work assignment.

Iowa Code section 96.5-1-j provides:

> An individual shall be disqualified for benefits:
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> 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.
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> 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.
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> For the purposes of this paragraph:

> (1) "Temporary employee" means an individual who is employed by a temporary employment firm to provide services to clients to supplement their work force during absences, seasonal workloads, temporary skill or labor market shortages, and for special assignments and projects.
>
> (2) "Temporary employment firm" means a person engaged in the business of employing temporary employees.

871 IAC 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 has not offered a copy of its end-of-assignment notification policy for the hearing. Based on the employer's testimony concerning the content of the policy, the administrative law judge concludes that the assignment does not comply with the requirements of the statute because it does not specifically set forth the unemployment insurance consequences of an employee's failure to contact the employer within three working days of the completion of an assignment. In addition, the employer is unsure whether Mr. Harris received a copy of the policy he signed. For these two reasons, the administrative law judge concludes that the employer failed to comply with the requirements of Iowa Code section 96.5(1)(j). Accordingly, that statute cannot be used as a basis for disqualifying Mr. Harris for unemployment insurance benefits. Because the statute did not apply, Mr. Harris fulfilled his contract of hire when he completed the assignment and was under no obligation to seek further assignments through the employer.

The refusal of work issue presents a separate and distinct eligibility issue.
Iowa Code section 96.5(3)(a) provides as follows:

> Causes for disqualification.
>
> An individual shall be disqualified for benefits:
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> 3. *Failure to accept work.* If the department finds that an individual has failed, without good cause, either to apply for available, suitable work when directed by the department or to accept suitable work when offered that individual. The department shall, if possible, furnish the individual with the names of employers which are seeking employees. The individual shall apply to and obtain the signatures of the employers designated by the

department on forms provided by the department. However, the employers may refuse to sign the forms. The individual's failure to obtain the signatures of designated employers, which have not refused to sign the forms, shall disqualify the individual for benefits until requalified. To requalify for benefits after disqualification under this subsection, the individual shall work in and be paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.
a. (1) In determining whether or not any work is suitable for an individual, the department shall consider the degree of risk involved to the individual's health, safety, and morals, the individual's physical fitness, prior training, length of unemployment, and prospects for securing local work in the individual's customary occupation, the distance of the available work from the individual's residence, and any other factor which the department finds bears a reasonable relation to the purposes of this paragraph. Work is suitable if the work meets all the other criteria of this paragraph and if the gross weekly wages for the work equal or exceed the following percentages of the individual's average weekly wage for insured work paid to the individual during that quarter of the individual's base period in which the individual's wages were highest:
(a) One hundred percent, if the work is offered during the first five weeks of unemployment.
(b) Seventy-five percent, if the work is offered during the sixth through the twelfth week of unemployment.
(c) Seventy percent, if the work is offered during the thirteenth through the eighteenth week of unemployment.
(d) Sixty-five percent, if the work is offered after the eighteenth week of unemployment.
(2) However, the provisions of this paragraph shall not require an individual to accept employment below the federal minimum wage.
b. Notwithstanding any other provision of this chapter, no work shall be deemed suitable and benefits shall not be denied under this chapter to any otherwise eligible individual for refusing to accept new work under any of the following conditions:
(1) If the position offered is vacant due directly to a strike, lockout, or other labor dispute;
(2) If the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;
(3) If as a condition of being employed, the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.

Iowa Administrative Code rule 871 IAC 24.24 provides as follows:

24.24(15) *Suitable work.* In determining what constitutes suitable work, the department shall
consider, among other relevant factors, the following
a. Any risk to the health, safety and morals of the individual.
b. The individual's physical fitness.
c. Prior training.
d. Length of unemployment.
e. Prospects for securing local work by the individual.
f. The individual's customary occupation.
g. Distance from the available work.
h. Whether the work offered is for wages equal to or above the federal or state minimum wage, whichever is higher.

i. Whether the work offered meets the percentage criteria established for suitable work which is determined by the number of weeks which have elapsed following the effective date of the most recent new or additional claim for benefits filed by the individual.
j. Whether the position offered is due directly to a strike, lockout, or other labor dispute.
k. Whether the wages, hours or other conditions of employment are less favorable for similar
work in the locality.
l. Whether the individual would be required to join or resign from a labor organization.

After weighing these factors, the administrative law judge concludes that the work offered by the employer was not suitable within the meaning of the law and that Mr. Harris had good cause for refusing the offer of employment. Though the lower decision appears to have been decided exclusively on the basis of the offered wage, the wage was not the issue. The $9.50 hourly wage would provide Mr. Harris with about $380.00 in weekly wages, which would exceed his average weekly wage during his highest earning base period. The type of work was similar to the production work that Mr. Harris had previously performed. The work was offered at a time when Mr. Harris had an active claim for benefits and was offered during the third week of his claim. The issue, as Mr. Harris indicated, was the 20-mile commuting distance from Cedar Rapids to North Liberty. Mr. Harris did not own a vehicle, but had limited use of his fiancé's vehicle. His fiancée needed her vehicle to sustain her employment, so the vehicle was not available to Mr. Harris to use to commute to North Liberty. Mr. Harris had previously only performed work for the employer in Cedar Rapids. A reasonable person would expect Mr. Harris's prospects of locating additional work in the Cedar Rapids metropolitan area to be good.

DECISION:

The Claims Deputy's February 27, 2014, reference 03 is reversed. The claimant was discharged from the assignment for no disqualifying reason. The claimant fulfilled the contract of hire by completing the assignment. The January 23, 2014 separation was for good cause attributable to the employer. The work offered to the claimant on February 3, 2014 was not suitable work within the meaning of the law. The claimant had good cause for refusing the offer of employment. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to the claimant.

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James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

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