

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**BENJAMIN KUYKENDALL**  
Claimant

**APPEAL NO. 15A-UI-12058-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**TEAM STAFFING SOLUTIONS INC**  
Employer

**OC: 10/04/15**  
**Claimant: Appellant (5)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

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

**STATEMENT OF THE CASE:**

Benjamin Kuykendall filed a timely appeal from the October 22, 2015, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits; based on an Agency conclusion that Mr. Kuykendall had voluntarily quit on August 15, 2015 without good cause attributable to the employer, by failing to notify the temporary employment firm within three working days of the completion of his last assignment after being told in writing of his responsibility to do so. The administrative law judge notes that the August separation date was erroneous and that the separation in question occurred in September 2015. After due notice was issued, a hearing was held on November 17, 2015. Mr. Kuykendall participated. Sarah Fiedler represented the employer. Exhibits One and B were received into evidence.

**ISSUE:**

Whether the claimant's separation from his assignment at KPI Concepts, Inc. was for misconduct in connection with the assignment that disqualifies him for benefits. It was.

Whether the claimant's separation from the temporary employment agency contemporaneous with his separation from the assignment was for good cause attributable to the employer. The administrative law judge concludes this is a moot issue in light of the disqualifying separation from the temporary work assignment.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Team Staffing Solutions, Inc. is a temporary employment agency. Benjamin Kuykendall last performed work for the employer in a full-time, temporary work assignment at KPI Concepts, Inc. in Burlington. Mr. Kuykendall lived in Burlington. The assignment began on Monday, August 24, 2015. The work hours were 7:30 a.m. to 2:00 p.m., Monday through Friday. Mr. Kuykendall last performed work in the assignment on Tuesday, September 8, 2015. On September 10, 2015, KPI Concepts ended the assignment based on attendance.

If Mr. Kuykendall needed to be absent from the assignment, the Team Staffing work rules required that Mr. Kuykendall notify both Team Staffing and KPI by telephone or in person prior to the start of his shift. This requirement had been reviewed with Mr. Kuykendall at the start of the assignment. More often than not, Team Staffing would learn of Mr. Kuykendall's absences from KPI, rather than from Mr. Kuykendall. On August 28 and 29, Mr. Kuykendall was absent due to illness and provided proper notice. On September 1, Mr. Kuykendall left work early with notice to KPI, but without providing notice to Team Staffing. On September 2, Mr. Kuykendall was absent due to illness. Mr. Kuykendall notified KPI, but not Team Staffing. On September 3, Mr. Kuykendall arrived late and left early for personal reasons. Mr. Kuykendall notified Team Staffing and KPI that he would be late. Mr. Kuykendall notified KPI of his need to leave early, but did not notify Team Staffing. On Friday, September 4, Mr. Kuykendall was absent for personal reasons. Mr. Kuykendall notified KPI, but did not notify Team Staffing. Monday, September 7, was Labor Day. On Tuesday, September 8, Mr. Kuykendall worked his assigned shift. On September 9, Mr. Kuykendall provided late notice to Team Staffing that was going to be absent from his shift that day so that he could drive his friend and her sick child to Iowa City for a medical appointment. At that time, Barb Garrett, Team Staffing Account Manager, warned Mr. Kuykendall that his assignment was in jeopardy based on his attendance issues. Ms. Garrett warned Mr. Kuykendall that one more absence would result in KPI terminating the work assignment. On September 10, Mr. Kuykendall was absent and provided late notice to Team Staffing that he would be absent because he was stuck in Iowa City. Mr. Kuykendall asserts that his car broke down in Iowa City. At the time of the contact on Thursday, September 10, Ms. Garrett notified Mr. Kuykendall that the assignment at KPI was ended due to Mr. Kuykendall's attendance issues. Mr. Kuykendall next made contact with Team Staffing on September 14, 2015, when he checked for a new assignment and completed paperwork regarding his assignment preferences.

On August 21, 2015, Mr. Kuykendall signed a Team Staffing Notification Requirement – Availability for Work Assignments policy statement. The policy obligated Mr. Kuykendall to contact Team Staffing within three working days of the completion of an assignment or be deemed a voluntary quit and risk ineligibility for unemployment insurance benefits. Mr. Kuykendall received a copy of the document he signed.

#### **REASONING AND CONCLUSIONS OF LAW:**

The administrative law judge first address Mr. Kuykendall's separation from the assignment at KPI Concepts. The evidence supports Mr. Kuykendall's assertion that he was discharged from the assignment and did not voluntarily quit the assignment.

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).

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).

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's *unexcused* absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). Employers may not graft on additional requirements to what is an excused absence under the law. See Gaborit v. Employment Appeal Board, 743 N.W.2d 554 (Iowa Ct. App. 2007). For example, an employee's failure to provide a doctor's note in connection with an absence that was due to illness properly reported to the employer will not alter the fact that such an illness would be an excused absence under the law. Gaborit, 743 N.W.2d at 557.

The evidence in the record establishes that Mr. Kuykendall was discharged from the assignment at KPI Concepts for excessive unexcused absences. In connection with several of the absences Mr. Kuykendall did not properly notify Team Staffing. Each such absence was an unexcused absence under the applicable law. These included the final two absences as well as earlier absences. In addition, the majority of the absences due to matters of personal

responsibility, such as lack of transportation or a desire to transport a friend's sick child to Iowa City for medical care that presumably could have been obtained in Burlington. Remarkably, the final unexcused absence occurred the day after the employer specifically warned Mr. Kuykendall that the employment was in jeopardy. The weight of the evidence establishes that appearing for the assignment was not a priority for Mr. Kuykendall. Regardless of whether Mr. Kuykendall made contact with the employer within three working days to request a new assignment, Mr. Kuykendall is disqualified for benefits based on being discharged from the assignment for misconduct in connection with the employment. Mr. Kuykendall is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Kuykendall for the period beginning September 10, 2015.

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. 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.

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.

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.

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.

Because the administrative law judge concludes that Mr. Kuykendall was discharged from the assignment for misconduct in connection with the employment and, therefore, disqualified for benefits based on that discharge, the administrative law judge need not further address the separation from the temporary employment agency.

**DECISION:**

The October 22, 2015, reference 01, decision is modified as follows. The claimant was discharged from the temporary work assignment on September 10, 2015 for excessive unexcused absences. The claimant is disqualified for benefits until he has worked in and been paid wages equal to 10 times his weekly benefit amount. He must meet all other eligibility requirements. The employer's account will not be charged.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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