

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

CHAD E HENDERSON
Claimant

DES STAFFING SERVICES INC
Employer

APPEAL NO. 21A-UI-21516-JT-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 05/17/20
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 September 22, 2021, reference 07, decision that allowed benefits to the claimant, provided he met all other eligibility requirements, and that held the employer's account could be charged, based on the deputy's conclusion that the claimant voluntarily quit on December 2, 2020 with good cause attributable to the employer due to a change in the contract of hire. After due notice was issued, a hearing was held on November 18, 2021. The claimant, Chad Henderson, did not provide a telephone number for the appeal hearing and did not participate. Kathy Anderson, Human Resources Manager, represented the employer. Exhibits 1, 2, 3 and 9 through 13 were received into evidence. The administrative law judge took official notice of the following Agency administrative records: DBRO, KPYX, NMRO and KFFV. Fact-finding materials pertaining to the September 14, 2021 fact-finding interview were not available to the administrative law judge at the time of the appeal hearing.

ISSUES:

Whether the December 2, 2020 separation date is the correct separation date.
Whether the claimant was laid off, voluntarily quit without good cause attributable to the employer, or was discharged 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: DES Staffing Services, Inc. is a temporary employment agency. The employer has a branch office in Cedar Rapids.

On January 2, 2020, almost nine months before the claimant, Chad Henderson, began his first assignment with the employer, DES had the claimant, Chad Henderson, "electronically" sign a DES General Policies and Guidelines document. The document included three paragraphs pertaining to attendance policy, a paragraph entitled "Temporary Employee Contract," and an employee handbook acknowledgement paragraph. The document included a place for a single

electronic “signature” to acknowledge all of the employer’s policies, including by reference all of the policies contained in the employee handbook. The employer also had the claimant provide a handwritten signature on the policy form. The paragraph entitled Temporary Employee Contract appeared as the fourth of five paragraphs and provided as follows:

Temporary Employee Contract: I understand it is my responsibility to call DES within three (3) business days of my job assignment ending to seek reassignment. Failure to do so shall be deemed a voluntary quit. Please be aware that unemployment benefits may be denied for failure to contact DES upon completion of an assignment. You must seek reassignment prior to filing for unemployment insurance benefits.

The document does not include a statement that the employer provided the claimant with a copy of the document he signed and does not indicate the claimant acknowledged receipt of the document he signed.

The claimant most recently worked for the employer in a full-time, temporary work assignment at a Goodwill facility in Cedar Rapids. The assignment started on October 28, 2020. The work hours were 8:00 a.m. to 4:30 p.m., Monday through Friday. The assignment paid \$10.00 an hour. Mindy (last name unknown) was the claimant’s supervisor at Goodwill. The claimant completed shifts on October 28 and 29, 2020. The claimant worked 1.5 hours on Friday, October 30, 2020. Though details are lacking, it appears the claimant left work early on October 30, 2020 due to a medical issue. On the morning of Monday, November 2, 2020, the claimant contacted the DES Cedar Rapids office prior to the scheduled start of his shift. The claimant stated he had a medical note allowing him to return to work and asked whether he could return to the Goodwill assignment. A DES representative contacted Mindy at Goodwill and Mindy stated the claimant could return to the assignment at 8:00 a.m. on November 3, 2020. A DES representative attempted to call the claimant to let him know he could return to the assignment, but encountered a phone number that was not in service. The DES representative then sent an email message to the claimant that included the information from Mindy about returning to the assignment on November 3, 2020. On the morning of November 2, 2020, the claimant sent an email response in which he provided an updated phone number and indicated he would report to the Goodwill assignment on November 3, 2020. When the claimant did not report for the Goodwill assignment on November 3, 2020 and did not give notice that he would be absent, Goodwill ended the assignment.

On November 5, 2020, the claimant contacted the employer to indicate that he was available for work. A DES representative documented only “CALLED IN AVAILABLE – REFUSED TCC AND ADI.”

The claimant did not return to perform additional work for the employer. The separation occurred during the first week of November 2020, not in December 2, 2020.

On or about June 10, 2021, an Iowa Workforce Development representative contacted DES for a cold-call fact-finding interview pertaining to the alleged November 5, 2020 job refusals. At that time, Jamie Scott, Human Resources Manager, provided information to the deputy. Ms. Scott is no longer with the employer. The IWD contact with the employer in June 2021 did not lead to a decision being entered. Indeed, IWD docketing records reflect that the reference 04 work refusal concern was deleted from the docketing system.

On August 25, 2021, Iowa Workforce Development mailed notice to the parties regarding a fact-finding interview set for September 14, 2021. The docketing record erroneously includes

December 2, 2020 as the separation date at issue. That date actually pertained to the claimant's separation from a subsequent employer.

On September 6, 2021, in preparation for the fact-finding interview, Julie Redmond, Director of Operations, prepared a summary document concerning the claimant's employment relationship with DES. In the summary document, Ms. Redmond provided the particulars of the prospective assignments DES discussed with the claimant on November 5, 2020. Ms. Redmond indicated in the summary document that the TCC assignment was a full-time material handler position located in Vinton, that the proposed work hours were 11:30 a.m. to 9:30 p.m. Monday through Friday, that the pay would be \$14.00 an hour, and that the work would include overtime hours. Ms. Redmond wrote in the summary document that the claimant declined the TCC assignment due to the inclusion of overtime work. Ms. Redmond wrote in the summary document that the proposed ADI assignment was a warehouse assignment in Cedar Rapids, that the work hours would be 7:30 a.m. to 3:30 p.m. Monday through Friday and that the work would involve loading and unloading trucks with siding, roofing materials and windows. Ms. Redmond wrote in the summary document that the claimant declined the ADI assignment because he did not want to perform heavy lifting.

On September 14, 2020, an Iowa Workforce Development Benefits Bureau deputy held the scheduled fact-finding interview. DES representative's Julie Redmond and Kathy Anderson participated in the September 14, 2020 fact-finding interview and provided verbal and documentary evidence regarding the claimant's separate from DES during the first week of November 2020. The subsequent reference 07 decision erroneously referenced a December 2, 2020 separation from DES.

The claimant established an original claim for benefits that was effective May 17, 2020. Iowa Workforce Development set the weekly benefit amount at \$481.00. The claimant exhausted regular benefits effective October 24, 2020. The claimant subsequently received \$15,873.00 in Pandemic Emergency Unemployment Compensation (PEUC) benefits for the 33 weeks between October 25, 2020 through June 12, 2021. The PEUC benefits were \$481.00 per week. In connection with receiving the PEUC benefits, the claimant also received \$7,200.00 in Federal Pandemic Unemployment Compensation (FPUC) benefits for the 24 weeks between December 27, 2020 and June 12, 2021. The FPUC benefits were \$300.00 per week.

REASONING AND CONCLUSIONS OF LAW:

The administrative law judge will first consider whether the discharge from the assignment disqualifies the claimant for unemployment insurance benefits.

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 Iowa Administrative Code rule 871-24.32(4).

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 Iowa Administrative Code rule 871-24.32(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 Iowa Administrative Code rule 871-24.32(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 claimant was discharged from the Goodwill assignment for no disqualifying reason. The evidence in the record establishes the claimant was discharged from the Goodwill assignment in response to a no-call, no-show absence on November 3, 2020. That absence was an unexcused absence under the applicable law. The evidence does not establish any other unexcused absences in connection with the Goodwill assignment and, therefore, does not establish a discharge for excessive unexcused absences.

The administrative law judge will now address the claimant's separation from the employment relationship with 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 did not comply with the notice requirements set forth at Iowa Code section 96.5(1)(j) and, therefore, subsection "j" does not govern the claimant's separation from the employment. First, the document signed on January 2, 2020, almost nine months before the claimant performed any work for the employer, does not provide the notice contemplated in and required by the statute. Second, the employer buried the end-of-assignment notice requirement in the fourth paragraph of a five paragraph document that purports to be a single acknowledgement of all employer policies, including by reference all policies contained in the employee handbook. This approach by the employer does not provide the notice contemplated in and required by the statute. Third, there is no evidence the employer provided the policy document to the claimant. Because the employer failed to comply with subsection "j", and because subsection "j" does not apply, the claimant fulfilled the contract of hire upon completion of the temporary work assignment and was not obligated to seek another assignment with the employer.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that the claimant's separation from the temporary employment agency was for good cause attributable to the temporary employment agency. The separation was effective November 3, 2020. The employer's account may be charged for benefits.

DECISION:

The September 22, 2021, reference 07, decision is modified as follows. The claimant was discharged from the Goodwill assignment on November 3, 2020 for no disqualifying reason. The claimant's separation from the temporary employment agency was for good cause attributable to the temporary employment agency. The separation was effective November 3, 2020. The claimant is eligible for benefits provided he is otherwise eligible. The employer's account may be charged for benefits paid to the claimant.

A handwritten signature in cursive script that reads "James E. Timberland". The signature is written in dark ink on a light-colored background.

James E. Timberland
Administrative Law Judge

December 27, 2021

Decision Dated and Mailed

jet/abd