

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

EMILY R PROTSMAN
Claimant

APPEAL NO. 20A-UI-07309-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DES STAFFING SERVICES INC
Employer

OC: 03/22/20
Claimant: Respondent (5)

Iowa Code Section 96.5(1)(j) – Separation From Temporary Employment
Iowa Admin. Code r. 871-24.26(19) – Fulfillment of the Contract or Hire

STATEMENT OF THE CASE:

The employer filed a timely appeal from the June 25, 2020, reference 04, decision that allowed benefits to the claimant, provided she was otherwise eligible, and that held the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on March 22, 2020 for no disqualifying reason. After due notice was issued, a hearing was held on August 6, 2020. Claimant Emily Protsman participated. Jamie Scott represented the employer and presented additional testimony through Julie Redmond. Exhibit 2 was received into evidence. The administrative law judge took official notice of the Agency's administrative record of benefits paid to the claimant (DBRO and KPYX).

ISSUE:

Whether the claimant was discharged from the temporary employment work assignment 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. Claimant Emily Protsman has been employed by DES Staffing during separate and distinct periods separated by slightly more than two years. The most recent period of employment began on March 15, 2020, when the employer placed Ms. Protsman in a full-time, temp-to-hire cooking assignment at Area Substance Abuse Council (ASAC). The work hours in the assignment were 8:30 a.m. to 5:00 p.m., Monday through Friday. Cindy Johnson, ASAC Food Service and Operations Support Manager, was Ms. Protsman's supervisor in the assignment. Ms. Johnson ended the assignment on Friday, March 20, 2020. On the evening of March 20, Ms. Johnson sent an email to Julie Redmond, DES Staffing Services Operations Manager, that terminated the assignment and set forth concerns as follows:

I am sorry to say that Emily did not work out for ASAC, could you please notify her that we will no longer need her? I would be happy to discuss this in detail so please feel to reach out [sic]. There were issues with her on the phone excessively, she has NO cooking experience only serving experience, she did not seem to understand how to read a recipe and she needs direction in all areas. My goal was to find a self-starter that took initiative, however she stands waiting for direction. I feel we tried to give her direction but she just did not catch on.

On Monday, March 23, 2020, Ms. Redmond notified Ms. Protsman that Ms. Johnson had ended the assignment based on Ms. Protsman not meeting expectations. Ms. Redmond mentioned the phone use issue. Ms. Protsman stated that she had been unaware of a phone use policy. Ms. Johnson had not communicated to DES that ASAC had a phone policy and, accordingly, DES had not communicated a phone use policy to Ms. Protsman. On March 19, Ms. Protsman had taken a break with another worker after lunch had been served and before it was time to prepare for the evening meal. Ms. Protsman had used her phone at that time. Ms. Johnson approached and told Ms. Protsman there was not time for her to be on her phone. Ms. Protsman did not thereafter use her cellphone. At the time Ms. Redmond notified Ms. Protsman that the assignment was done, Ms. Protsman asked whether DES had another assignment for her. Ms. Redmond did not have another assignment for Ms. Protsman at the time, but agreed to continue to look for a new assignment. The parties next had contact on April 17, 2020.

In connection with most recent, distinct period of employment, the employer did not present Ms. Protsman with a policy that would obligate Ms. Protsman to contact the employer at the end of an assignment to request a new assignment and did not have Ms. Protsman sign any such policy.

Ms. Protsman established a claim for benefits that was effective March 22, 2020. Her base period consists of the fourth quarter of 2018 and the first, second and third quarters of 2019. DES is not a base period employer for purposes of the claim year that began March 22, 2020.

REASONING AND CONCLUSIONS OF LAW:

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 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).

The evidence in the record fails to establish misconduct in connection with the ASAC assignment. Ms. Johnson's March 20, 2020 email makes clear that she simply concluded Ms. Protsman was not a good fit for the position. The only purported rule violation was use of a cellphone. However, no cell phone policy was communicated to Ms. Protsman prior to March 19, 2020 and there is insufficient evidence to prove any further cell phone use. ASAC's decision to terminate the assignment would not disqualify Ms. Protsman for unemployment insurance benefits or relieve the employer's account of liability for benefits.

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, in relevant part, as follows:

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.

The evidence in the record establishes a March 23, 2020 separation that was for good cause attributable to the employer. Ms. Protsman complete the ASAC assignment on March 20, 2020. The employer had not complied with the notice requirement set forth at Iowa Code section 96.5(1)(j)(2). The employer did not advise Ms. Protsman in writing at the time of relevant employment that she was required to contact the employer within three working days of the end of the assignment to request a new assignment or be deemed to have voluntarily quit and risk being disqualified for unemployment insurance benefits. The employer did not ensure that

Ms. Protsman read and signed such a policy in connection with the relevant employment. Because the employer failed to substantially comply with the requirements of subsection J of Iowa Code section 96.5(1), that subsection does not apply to Ms. Protsman's employment. Ms. Protsman fulfilled her contract of hire when she completed the assignment. Even if Iowa Code section 96.5(1)(j) had applied to the employment, the weight of the evidence indicates that Ms. Redmond notified Ms. Protsman on March 23 that the assignment was done and that Ms. Protsman asked for another assignment as part of that conversation. Ms. Protsman is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits. The administrative law judge notes that the employer is not a base period employer for purposes of the claim year that was effective March 22, 2020. That means the employer will not be charged for benefits during the current claim year, but may be charged for benefits paid in connection with a future claim year.

DECISION:

The Agency representative's June 25, 2020, reference 04, decision is modified as follows. The claimant's separation from the temporary employment agency was for good cause attributable to the temporary employment agency. The separation was effective March 23, 2020. The claimant is eligible for benefits provided she is otherwise eligible. The employer's account may be charged for benefits paid to the claimant.



James E. Timberland
Administrative Law Judge

August 14, 2020
Decision Dated and Mailed

jet/mh