

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**JOSH LEVINE**  
Claimant

**TEMP ASSOCIATES – IOWA INC**  
Employer

**APPEAL 17A-UI-05747-DL-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 04/30/17  
Claimant: Respondent (1)**

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Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Code § 96.5(1)j – Voluntary Quitting – Temporary Employment

**STATEMENT OF THE CASE:**

The employer filed an appeal from the May 25, 2017, (reference 01) unemployment insurance decision that allowed benefits based upon voluntarily quitting the employment. The parties were properly notified about the hearing. A telephone hearing was held on June 20, 2017. Claimant participated. Employer participated through account manager Sherry Savely and Aladdin Food .

**ISSUES:**

Did claimant quit by not reporting for additional work assignments within three business days of the end of the last assignment?  
Was the claimant discharged for disqualifying job-related misconduct?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time dishwasher assigned at Aladdin Food Management through April 3, 2017. His last day of work was April 2, 2017. He was separated from the assignment and the employment. Branch manager Darien Sloat sent him a text message on April 3 at 9 a.m. telling him the assignment had ended. On April 4 claimant had not received the text from Sloat and e-mailed Savely to say he could not report for work that day. Savely notified him he had been separated from the assignment. Neither she nor Sloat told him he was also fired from Temp Associates. Claimant asked for other work. She told him there was no work available at the time but did not mention she would not look for work on his behalf.

Claimant's work hours were 10:30 a.m. to 9 p.m. four days per week on Tuesday, Wednesday, Saturday and Sunday, but that week he also worked Friday. He was unable to sleep early Sunday morning April 2 so drank Nyquit between 3 and 4 a.m. He did not consume liquor. He brushed his teeth before he went to work and used mouthwash. Duvall was claimant's supervisor at the assignment. On Sunday April 2, Duvall thought claimant's breath smelled of alcohol and thought claimant was not acting "normally." Duvall could tell it was not beer but is not familiar with other types. Duvall did not tell claimant he smelled alcohol on his breath but spoke to him from three feet away and asked how he was doing. Claimant said he was okay

and kept washing pans but asked Duvall if he could go home because he was tired. Claimant did not tell Duvall sometimes he needs alcohol to get through the day and did not ask to be sent home. Duvall did not ask claimant what time or day he had his most recent drink of alcohol and did not ask him to submit to a breath test. Cook's assistant and claimant's friend Alan Thompson did not interact with claimant. Claimant waved at Thompson on the way out. Thompson did not participate in the hearing.

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

For the reasons that follow, the administrative law judge concludes claimant did not quit but was discharged from employment for no disqualifying reason.

Iowa Code section 96.5(2)a provides:

### **Causes for disqualification.**

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. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); *accord Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000).

Whether an employee violated an employer's policies is a different issue from whether the employee is disqualified for misconduct for purposes of unemployment insurance benefits. See *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000) ("Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits." (Quoting *Reigelsberger*, 500 N.W.2d at 66.)).

The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence

not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976). It is permissible to infer that Thompson's testimony was not submitted because it would not have been supportive of the employer's position. See, *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976). Accordingly, where the parties' recollection of events differ, the claimant's testimony is considered credible. The employer has not met the burden of proof to establish that claimant drank liquor alcohol before or at work. Claimant has also met the requirements of Iowa Code § 96.5(1)j.

**DECISION:**

The May 25, 2017, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

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Dévon M. Lewis  
Administrative Law Judge

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Decision Dated and Mailed

dml/rvs