

**IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI**

**NANCY K PATTERSON
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**MANPOWER INTERNATIONAL INC
MANPOWER TEMPORARY SERVICES
C/O FRICK UC EXPRESS
PO BOX 66864
ST LOUIS MO 63166-6864**

**Appeal Number: 06A-UI-07403-H2T
OC: 01-15-06 R: 04
Claimant: Respondent (1)**

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge/Misconduct
Section 96.5-1-j – Voluntary Leaving

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 19, 2006, reference 02, decision that allowed benefits. After due notice was issued, a hearing was held on August 9, 2006. The claimant did participate. The employer did participate through (representative) Jennifer Lincoln-Lewis, Staffing Specialist and Maria Way, Senior Staffing Specialist.

ISSUES:

Did the employer discharge the claimant for work-connected misconduct?

Did the claimant seek reassignment from the employer after she was discharged from her assignment?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was assigned to work as a teller/receptionist at the State Bank of Wapello beginning on February 22, 2006 through June 7, 2006 when she was discharged from the assignment because the bank did not believe she had the necessary skills to perform the assignment. The bank did not believe that the claimant's computer skills were sufficient for her to perform the functions required of her.

After being released by the bank, the claimant contacted Manpower the very next day to tell them that she had been released from her position and that she was available for additional work. At the time the claimant notified the employer that the assignment had ended, she was advised the employer had no additional assignments available for her at that time.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979). Where an individual is discharged due to a failure in job performance, proof of that individual's ability to do the job is required to justify disqualification, rather than accepting the employer's subjective view. To do so is to impermissibly shift the burden of proof to the claimant. Kelly v. IDJS, 386 N.W.2d 552 (Iowa App. 1986). Inasmuch as she did attempt to perform the job to the best of her ability but was unable to meet the employer's expectations, no intentional misconduct has been established, as is the employer's burden of proof. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Accordingly, no disqualification pursuant to Iowa Code section 96.5-2-a is imposed.

For the reasons that follow, the administrative law judge concludes the claimant did seek reassignment from the employer after being discharged from her assignment.

Iowa Code section 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.

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 purpose of the statute is to provide notice to the temporary agency employer that the claimant is available for work at the conclusion of the temporary assignment. In this case, the employer had notice of the claimant's availability because she notified them of the end of the assignment and asked for additional work. The claimant specifically spoke to Maria Way who told her to contact her local unemployment office to seek help filing a claim for benefits. The fact that Ms. Way sent her to her local unemployment office clearly indicates that she knew the claimant was no longer working. The claimant spoke to Ms. Way the day after she was let go from the bank assignment, well within the three days required by the statute. Benefits are allowed.

DECISION:

The July 19, 2006, reference 02, decision is affirmed. The claimant's separation from employment was attributable to the employer. The claimant had adequate contact with the employer about her availability as required by statute. Benefits are allowed, provided the claimant is otherwise eligible.

tkh/pjs