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THE SUPREME COURT OF IOWA

NO. 18-0981
Johnson County CVCV079516

TERESA SLADEK,

PETITIONER/APPELLANT,

vs.

EMPLOYMENT APPEAL BOARD,

RESPONDENT

APPEAL FROM THE DISTRICT COURT
OF JOHNSON COUNTY

THE HONORABLE, JUDGE CHAD KEPROS

APPELLEE'S FINAL BRIEF
& REQUEST FOR ORAL ARGUMENT

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I, Rick Autry, hereby certify that I or a person acting on my behalf filed the Appellee's Final Brief on the 30th day of August, 2018, by EDMS to the Clerk of the Iowa Supreme Court, Iowa Judicial Building, 1111 E. Court Avenue, Des Moines, Iowa 50319.

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Statement Of Issues Presented For Review

I. Should The Court Undermine The Temporary Employment Industry And Also Cause Damage To The Interests Of Many Temporary Workers By Ruling That The Statutory Phrase "To Provide Services To Clients" Actually Means "While Providing Services To Clients" Thereby Permitting Temporary Workers Whose Only Wage Credits Are From Their Temporary Employer To Do Whatever They Want Following The End Of An Assignment So Long As They Have Called In One Time?

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R. App. Pro. 6.1101(2)

Iowa Code §17A.19(7)

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Cerro Gordo County Care Facility v. Iowa Civil Rights Commission, 401 N.W.2d 192 (Iowa 1987)

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871 IAC 24.26(15)

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II. Was It An Error Of Law To Conclude That A Claimant Who Was Required By Her Employer To Call In And Request Reassignment Once Her Assignment Had Ended Had Quit When She Instead Hung Up On Her Supervisor, Remained Incommunicado For Weeks, And Then Tried To Get Employed Directly By The Client Where The Assignment Had Been?

Iowa Code §96.5(1)

871 IAC 24.1(113)(b)

FDL Foods, Inc. v. Employment Appeal Board, 460 N.W.2d 885 (Iowa App. 1990)

Peck v. Employment Appeal Board, 492 N.W.2d 438 (Iowa App. 1992)

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O'Hara v. State, 642 NW2d 303 (Iowa 2002)

Sun Valley Iowa Lake Ass'n v. Anderson, 551 NW2d 621 (Iowa 1996)

ROUTING STATEMENT: The issues in this appeal are "questions of applying existing legal principles" and thus the case should be transferred to the Court of Appeals. I. R. App. Pro. 6.1101(3)(a). It is an administrative appeal in an unemployment case that poses questions that are either merely the application of law to fact, follow from the literal terms of the statute, or have already been answered. None of the criterion of I. R. App. Pro. 6.1101(2) are satisfied.

STATEMENT OF THE CASE

NATURE OF CASE: Pursuant to Iowa Code section 17A.20, Teresa Sladek (Claimant) appeals from a decision of the district court affirming the Employment Appeal Board's (Board) ruling that she was disqualified from unemployment benefits based on the nature of her separation from her former employer, Kelly Services (Employer).

COURSE OF PROCEEDINGS: Teresa Sladek (Claimant) filed a claim for unemployment benefits with a claim date of July 2, 2017. (App. at p. 24). On July 31, 2017 the Iowa Workforce Development Center, Claims Section, issued a decision that disallowed benefits. (App. at p. 24). On August 9, 2017 an appeal was filed by the Claimant with the Iowa Workforce Development Center, Appeals Section. (App. at p. 25). An administrative law judge held a hearing September 27, 2017 to determine whether the Claimant was discharged for disqualifying misconduct or whether she voluntarily quit her employment without good cause attributable to the Employer, and whether she timely requested reassignment. (App. at p. 33; p. 36). On September 29, 2017 the administrative law judge issued a decision, which affirmed the claims deputy's decision by denying benefits. (App. at p. 59-63). The Claimant appealed the administrative law judge's decision to the Employment Appeal Board on October 12, 2017. (App. at p. 64). The Employment Appeal Board reviewed the matter and issued a unanimous decision affirming the administrative law judge's decision that denied benefits on November 9, 2017. (App. at p. 66). No request for rehearing was filed and this appeal followed and on December 6, 2017 the Claimant filed this appeal in Johnson County District Court. On May 16, 2018 the Honorable Chad Kepros entered an order affirming the Board's finding of disqualification. (App. at p. 68-81). None of the five agency fact finders to review this case voted to allow benefits, and this was affirmed by the district court.

STATEMENT OF THE FACTS: Teresa Sladek (Claimant) worked for Kelly Services, LLC (Employer) as a temporary employee on full time assignment, from January 5, 2016, until June 28, 2017. (App. at p. 37-38; p. 43). Staci Payne is a Senior Account Talent Manager with Kelly Services. (App. at p. 43). Most recently, the Claimant was assigned as a customer care representative with ACT. (App. at p. 42; p. 43). During this assignment, the Claimant had issues getting her telephone call times down to the brief five or six minutes the client expected. (App. at p. 42; p. 43-44; p. 47). She worked with trainers, with an ACT supervisor, and with Payne on this issue. (App. at p. 43-44; p. 47; p. 50; p. 52). Payne told the Claimant she needed to improve, and also encouraged her by telling her the employer would find Claimant additional work if the ACT assignment did not work out. (App. at p. 42-43; p. 44). The Claimant last reported to this assignment on June 27, 2017. (App. at p. 38). On June 28, Payne called the Claimant and notified her that her assignment had ended due to job performance and the excessive length of her calls. (App. at p. 38-39). The Claimant became upset and loudly told Payne this was not fair. (App. at p. 38-39; p. 45). Payne told the Claimant it was a done deal. (App. at p. 38-39). Claimant again expressed that it was not fair and she hung up on Payne. (App. at p. 39; p. 45). Claimant did not ask for an additional assignment during this conversation, and Payne did not offer any additional work. (App. at p. 39; p. 40; p. 43; p. 46). Payne did not contact the Claimant with possible assignments because she concluded that Claimant "made a pretty bold statement there by hanging up on me..." (App. at p. 45). Instead Payne expected the Claimant to contact her if she again wished to be

employed by Kelly. (App. at p. 45). Payne had not had a chance to even offer a new position during the truncated final call. (App. at p. 48).

On July 31, Claimant contacted Payne again. (App. at p. 39). She apologized for hanging up on Payne during her last conversation, and she requested additional work. (App. at p. 39). The Claimant understood after this call that the Employer considered that she had quit. (App. at p. 39). The Claimant acknowledges that she received a copy of the employer's three-day policy instructing her to request an additional assignment within three business days of a current assignment ending. (App. at p. 39-40; p. 46).

ARGUMENT

I. It Was No Error To Conclude That The End Of The Temporary Assignment Was Not The End Of The Claimant's Employment

A. PRESERVATION OF ERROR: The Board agrees that the Claimant preserved error on the issue of whether the agency was wholly unjustified in finding the Claimant quit her employment with Kelly Services.

B. STANDARD OF REVIEW: The role of the court when reviewing agency action under the Administrative Procedure Act is appellate in nature. Iowa Code §17A.19(7) (2018); *Mike Brooks, Inc. v. House*, 843 N.W.2d 885, 889 (Iowa 2014); *Cerro Gordo County Care Facility v. Iowa Civil Rights Commission*, 401 N.W.2d 192, 195

(Iowa. 1987). Accordingly the Court's review of an agency finding is at law and not de novo. *Harlan v. Iowa Department of Job Service*, 350 N.W.2d 192, 193 (Iowa 1984); *Mike Brooks, Inc.*, 843 N.W.2d at 889.

On factual issues it is clear that the EAB is due the usual deference. Too numerous for citation are the dozens of cases subjecting an EAB decision to the substantial evidence standard. *See e.g. Wolfe v. Iowa Unemployment Comp. Comm'n*, 232 Iowa 1254, 7 N.W.2d 799, 800-801 (Iowa 1943); *Powell v. Emp't Appeal Bd.*, 861 N.W.2d 279 (Iowa App. 2014). As a result the EAB's decision must be supported by "substantial evidence in the record before the court when that record is viewed as a whole." Iowa Code §17A.19(10)(f). "Substantial evidence" under this standard is what a reasonable mind would accept as adequate to reach a given conclusion, even if the reviewing court would have drawn a contrary inference from the evidence. *Mike Brooks, Inc. v. House*, 843 N.W.2d 885, 889 (Iowa 2014); *Titan Tire Corp. v. Employment Appeal Bd.*, 641 N.W.2d 752 (Iowa 2002). The possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's findings from being supported by substantial evidence. *Mike Brooks, Inc. v. House*, 843 N.W.2d 885, 889 (Iowa 2014); *Westling v. Hormel Foods Corp.*, 810 N.W.2d 247, 251 (Iowa 2012).

Meanwhile deference applies to an agency's application of law to fact if "application of law to fact ... has clearly been vested by a provision of law in the discretion of the agency." Iowa Code §17A.19(10)(m). If "the claim of error lies with the ultimate

conclusion reached, then the challenge is to the agency's application of law to the facts..." *Meyer v IBP Inc.*, 710 N.W.2d 213, 218 (Iowa 2006). "When the question is whether the agency erred in applying its rules, then the challenge is to the agency's application of the law to the facts, and the question on review is whether the agency abused its discretion by, for example, employing wholly irrational reasoning or ignoring important and relevant evidence." *Des Moines v. IDOT*, ____ N.W.2d ____, ____ , slip op. at 14 (Iowa 4/27/2018). The Employment Appeal Board is empowered "to hear and decide contested cases under chapter ...96." Iowa Code §10A.601(1); *accord* Iowa Code §96.6(3). As explained in *Mycogen Seeds* the EAB "out of necessity" must have the power to apply the law of disqualification to the facts of the cases it decides. Thus the Board is clearly vested with the authority to apply the law to the facts concerning eligibility for unemployment compensation in individual cases. *See Mycogen Seeds v. Sands*, 686 NW 2d 457, 465 (Iowa 2004); *accord e.g. Iowa Ag Constr. Co. v. Iowa State Bd. of Tax Review*, 723 N.W.2d 167, 174 (Iowa 2006). The conclusion about whether a disqualifying quit or misconduct was shown is an application of law to fact since it is the ultimate issue in the case. *E.g. Diaz v. EAB*, No. 12-2209 (Iowa App. 9/5/2013)("The employment appeal board's conclusion that Diaz was discharged for misconduct was not irrational, illogical, or a wholly unjustifiable application of law to fact."); *Avenarius v. EAB*, No. 13-0276 (Iowa App. 11/20/2013) (misconduct case holding that "the ultimate conclusion reached by the agency is only reviewed to determine whether the application of law to facts is 'irrational, illogical, or wholly unjustifiable'"); *Goodwin v. EAB*, 12-1825 (Iowa

App. 5/30/2013)(holding in misconduct case that "We conclude the agency's application of law to the facts of this case is not 'irrational, illogical, or wholly unjustifiable.'"); *Marzetti Frozen Pasta, Inc. v. EAB*, No. 08-0288, 2008 WL 4725151 (Iowa App. 10/29/2008)(in misconduct case applying "wholly unjustifiable" standard to application of law to fact); *Pongdara v. EAB*, No. 08-0789 (Iowa App. 10/29/2008) (Holding that "The determination of whether an employee has been discharged for misconduct has been vested in the agency" and applying "wholly unjustifiable" standard); *Wilharm v. EAB*, No. 16-1524 (Iowa App. 7/6/2017) (In case of alleged misconduct Court observes "the Board was not called upon to interpret the legal definition of misconduct"); *Bauder v. EAB*, 07-0927 (Iowa App. 2/27/2008)(decision whether worker met standard of being an employee subjected to wholly unjustifiable standard for application of law to facts); *Powell v. EAB.*, 861 N.W.2d 279 (Iowa App. 2014) (applying "wholly unjustifiable" standard to "the agency's application of law to fact" in a case where the EAB "corrected" error in analysis by IWD pertaining to denial of benefits to teacher during summer break); *Bunger v. EAB*, No. 17-0560 (Iowa App 11/22/2017) (On question of whether a quit has taken place the Court rules "We cannot conclude the Employment Appeal Board's application of law to fact was irrational, illogical, or wholly unjustifiable.")

Notably *Meyer* was decided after the 1998 amendments to the Iowa Administrative Procedures Act. These amendments separated out the ground of "application of law to fact" from the ground of "issue of law." Prior to these amendments the Code merely provided for reversal if the decision was "affected by other error of law." Iowa

Code §17A.19(8)(e) (1993). In many instances the concept of "application of law to fact" was largely subsumed under this concept of "other error of law." At the same time the deference given to agencies on this broader concept of "other error of law" was correspondingly broader. There was thus no need for precision in describing issues as either an issue of law or a mixed question; either way the agency was getting deference. The result was that agencies were given deference on determinations of such routinely administrative issues such as whether the facts of a specific case show a quit has taken place. In 1998 the concept of deference on legal issues was narrowed, but at the same time the concept of "application of law to fact" was specifically added by the statute. The revision was focused on "the standard of review of *statutory interpretation*" and the "the General Assembly's intent to vest the discretion to *interpret* the laws..." *Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 10-11 (Iowa 2010) (emphasis added). Interpretation being the focus, it is clear that the revised IAPA absolutely did not intend to have the Courts deciding the ultimate issue of who in each of thousands of specific fact patterns should or should not get unemployment benefits, workers' compensation benefits, etc. etc. Adoption of this updated Model State Administrative Procedure Act has not been widespread. Thus Iowa cases from before 1998 and cases from the jurisdictions that have not adopted the more specific "application of law to fact" (and the correspondingly more limited deference on "issues of law") must be distinguished. Such cases sometimes seem to treat as a question of "error of law" what now falls under the concept of application of law to fact. But as *Meyers* makes abundantly clear we now have a concept of "application of law to fact" and where a

challenge is to the ultimate conclusion that challenge implicates the application of law to fact.

Here the Claimant challenges the ultimate conclusion that the particular facts in this case show that the Employer carried its burden of showing that the Claimant quit. Determining whether the burden of proving a quit has been carried is the "ultimate issue" and thus is reviewed as the application of law to fact. Indeed, the question of whether the burden of proof has been met is always the ultimate question in any legal proceeding. *See e.g. Wehde v. Georgia-Pacific Corrugated,* L.L.C., No. 15-0045 (Iowa App. 4/27/2016)(describing challenge to whether burden of proof was carried as challenge to "ultimate issue" and applying the "law to fact" standard of review); *Newt Marine v. Abitz,* 15-1957 (Iowa App. 7-27-16) (describing decision that quoted the regulatory statute and concluded that a burden was carried as involving application of the law); *Norland v. Iowa Dept. of Job Service*, 412 N.W.2d 904 (Iowa 1987)(repeatedly describing carrying burden of proof as the ultimate issue in the case). Thus the parties all agree on the legal standard for determining quits, and the only fighting issues are what did the Claimant do, and did it constitute a quit– factual issues, and the application of law to fact.

The statute states that a worker will be disqualified for quitting without good cause attributable to the employer but only "if so found by the department." Iowa Code §96.5(1). There could be no clearer delegation to the agencies of the right to determine if a disqualifying quit has taken place. This necessarily entails determining if there is a quit, and whether the reasons for the quit are good cause. This case is no different than the many Iowa cases, decided after the 1998 amendments to the Iowa Administrative Procedures Act, which have

subjected the EAB's conclusions about qualification for benefits to the "wholly unjustifiable" standard for application of the law to facts.

When the Supreme Court reviews a district court decision on the validity of agency action it only asks whether the district court has correctly applied the law. *GITS Manu. v. St. Paul Travelers Inc.*, 855 N.W.2d 195, 197 (Iowa 2014); *Mike Brooks, Inc. v. House*, 843 N.W.2d 885, 888-89 (Iowa 2014). The Supreme Court merely applies the standards of §17A.19(10) to the agency action to determine whether the Supreme Court's conclusions are the same as those of the district court. If the Supreme Court has the same conclusions it affirms the district court and if the conclusions differ the Supreme Court must reverse.

C. THUMBNAIL SKETCH OF HOW UNEMPLOYMENT WORKS: The Claimant's arguments misapprehend how unemployment works in Iowa. It is thus necessary to give a *brief* overview of how unemployment works.

First, a claimant files an initial claim. The Court of Appeals recently explained the early steps in the process.

> When a claimant applies for unemployment compensation benefits, the agency is required to make "an initial determination of eligibility for unemployment insurance benefits." Iowa Admin. Code r. 871-24.7(3) (2015). The claimant's eligibility for benefits is determined by the claimant's earning history over the "base period." The "base period" is "the period beginning with the first day of the five completed calendar quarters immediately preceding the first day of an individual's benefit year and ending with the last day of the next to the last completed

> calendar quarter immediately preceding the date on which the individual filed a valid claim." Iowa Code § 96.19(3). In other words, the base period is the first four of the last five quarters completed before the quarter in which the claim was filed. Code section 96.4 sets forth the earnings criteria over the base period necessary to establish "monetary eligibility"—that is, eligibility for the receipt of benefits.
> ....
> [T]he claimant must have (1) base period wages greater than 125% of an individual's highest-earning quarter within the base period, (2) highest-earning-quarter wages at least 3.5% of the statewide average annual wage for insured work, and (3) second-highest-earning-quarter wages at least 50% of the wages required by (2).

Stanley v. EAB, No. 16-2047 Slip op. at 3-4 (Iowa App. 1/10/2018). Every employer in the base period may end up being charged for benefits. The order of charging is set out by law: "Benefits paid to an eligible claimant shall be charged against the base period wage credits in the same inverse chronological order as the wages on which the wage credits are based were paid to the claimant." 871 IAC 23.43(1). The amount of the weekly benefits, and the maximum benefits which can be collected over the 12-month "benefit year" is set out by statute, and is based on the amount of the wage credits found in the base period. Iowa Code §96.3(4)-(5).

A claimant who remains on payroll of an employer may collect total benefits for any week during which that claimant performs no work. Also partial unemployment can be drawn by those who do *some* work if that week's earnings are low enough, and certain other conditions are met. *See generally* 871 IAC 24.1(138)-(139). It is **not**

required that a claimant be separated from her job in order to collect benefits. All that is required in order to be totally unemployed for a given week is that the claimant not be earning wages that week. Thus a worker who remains employed by a temporary employer may nevertheless collect benefits while between assignments.

If a claimant works a moonlighting job before filing for benefits and then quits that supplemental employment then the claimant may not draw on those credits, but she may draw on other credits. *McCarthy v. Iowa Employment Sec. Commission,* 76 N.W.2d 201, 247 Iowa 760 (Iowa 1956). If a claimant quits part-time odd jobs or supplemental employment after claiming for benefits then the claimant may not draw on those credits in a subsequent benefit year, but may otherwise draw benefits. *See Welch v. IDJS,* 421 N.W.2d 150 (Iowa App. 1998); Iowa Code §96.5(12).

Under the unemployment law a worker must seek work, and can be disqualified if they refuse suitable work. The duty to seek work only applies while the worker is on benefits. Iowa Code §96.4(3). The disqualification for refusing work likewise only applies to those who have filed an initial claim for benefits. For this disqualification to apply the following conditions must be met: (1) the claimant must currently be on benefits (in her benefit year) (2) a definite offer and refusal occur during the benefit year (3) the offer is of suitable work, including that it meets statutory minimums for wage amount and (4) the refusal is not for good cause. Iowa Code §96.5(3)(a); *Biltmore Enterprises, Inc. v. Iowa Dept. of Job Service,* 334 N.W.2d 284, 287 (Iowa 1983); *Norland v. Iowa Department of Job Service,* 412

N.W.2d 904, 910 (Iowa 1987); *Pohlman v. Ertl Co.*, 374 N.W.2d 253 (Iowa 1985); *Dico, Inc., v. Iowa Employment Appeal Board*, 576 N.W.2d 352 (Iowa 1998)(offer must be during benefit year); 871 IAC 24.24(8)(same). So a refusal of suitable work has nothing at all to do with the loss of a job. In fact, the typical order of events is job loss, application for benefits, and *then* a refusal of work. The refusal is only relevant if it is made *after* the worker files for benefits, and a worker typically (though not always) files for benefits *after* the job loss. Analytically and even temporally a disqualification based on the nature of the job loss and disqualification based on refusal of suitable work are quite distinct issues.

Except in cases of labor disputes, or incarceration resulting in job loss, only two types of separations from employment are disqualifying: quits and discharges. *See generally* Iowa Code §96.5. Where a contract of employment contemplates that it will end on its own after a certain time, or upon the occurrence of certain conditions, then the separation is neither a quit nor a discharge and so is not disqualifying. *See e.g.* 871 IAC 24.26(22); *Seeberger v. IA Dept. of Judicial Administration*, 18A-UI-07108 (IWD 2018)[1](four year magistrate appointment).

D. THE CLAIMANT WAS AN EMPLOYEE OF KELLY SERVICES AND WAS STILL SO EMPLOYED AFTER HER ASSIGNMENT AT ACT HAD ENDED: The Claimant argues that the mere fact that Kelly Services told her that the assignment with *ACT* had ended means that it was

[1] Online: http://uidecisions.iowaworkforcedevelopment.gov/solr/ui-decisions/browse?q=18A-UI-07108

impossible for the Claimant to have quit her job with *Kelly Services*. This is not the law. On a systemic scale the Claimant's proposal would actually be both unfair to certain employers and bad for many claimants.

The Claimant's argument misses the point that while the Claimant lost her *assignment* to ACT she was still an *employee* of Kelly Services until she hung up on her superior and then became incommunicado for a month. The Claimant argues this case as if it involved what in **Iowa** is known as "spot labor." The difference between temporary and "spot" employment is significant, and well recognized based on specific provisions of law.

The basic difference between statutory "temporary employment" and regulatory "spot labor" is that when one works for a temporary employment firm the employment relationship continues even when not on assignment while with spot labor the end of the assignment also ends the employment. The key to spot labor is that the claimant "fulfilled the contract of hire when each of the jobs was completed." 871 IAC 24.26(19). In such cases the employee is hired to fulfill a single contract and when the contract is finished the employee is automatically separated from employment. Thus when you work spot labor you do not have to return and indicate your availability for reassignment at the end of the assignment, nor do you have to keep the employer updated with your contact information, accept calls from the employer, etc. With spot labor the contract of employment ends when the job ends and the separation is the automatic result of the ending of the assignment/contract not a quit,

layoff, or termination. *See Des Moines Independent Community School Dist. v. Department of Job Service*, 376 N.W.2d 605, 610 (Iowa 1985). In this spot labor is similar to any situation where "[t]he claimant was hired for a specific period of time and completed the contract of hire by working until this specific period of time had lapsed." 871 IAC 24.26(22). In such cases as well, the separation is a result of the contract ending and not a disqualifying action by the claimant. In short, in spot labor the job and the assignment are the same thing.

On the other hand, when one works for a temporary employment firm the employment relationship continues even when not on assignment. By **statute** a temporary employee, like the Claimant, "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." Iowa Code §96.5(1)(j)(3)(a) (emphasis added). So right away we see that the relationship between the worker and the "temporary employment firm" is employment. Under the statute and regulations a "temporary employment firm" is a firm that employs people "to provide services to clients..." Iowa Code §96.5(1)(j)(3)(b). The employment is to the firm but the services are provided to "clients." Thus when an assignment ends only the services end. The employee remains employed by the temporary employment firm and, under the statute, is required to return and offer services for additional clients. The statute says the worker is employed by the temporary firm "to"

provide services to clients, not "while" providing services. Thus the worker has *statutory* obligations to the temporary employer that post-date the end of the assignment. Iowa Code §96.(5)(1)(j)(1) (emphasis added); *accord* 871 IAC 24.26(15).

The difference between spot labor and temporary employment explains why one finds rule 24.26(19) on spot labor, and rule 24.26(15) on the separate issue of temporary employment. Rule 24.26(19) is the older rule and states that in the situation where the claimant "fulfilled the contract of hire when each of the jobs was completed" then "[a]n election not to report for a new assignment to work shall not be construed as a voluntary leaving of employment." 871 IAC 24.26(19); *see* Iowa Admin. Code Supp. 11/3/1976 rule 4.26(19). On the other hand, rule 24.26(15) governs the statutory category of temporary employment. The statute added the category of "temporary employment" in May of 1997. 97 Acts ch. 132. In December of 1998 IWD then added rule 24.26(15), formerly "reserved," in order "to reflect recent law changes defining separations from temporary employment firms." ARC 8571A, 12/16/98; Vol XXI IAB p. 1169 (12/16/98). With "temporary employment" the rule now sets out that the employment continues and that failure to report for reassignment *will be* disqualifying. Yet the agency did not strike the spot labor rule – because temporary employment and spot labor both still exist, and because they are different. Absolutely nothing in this record suggests that the Claimant was in the rather rare category of spot laborer. Instead the record fully supports that she was a temporary employee on long

term, not "spot," assignment and that she continued as an employee once no longer on assignment. (*E.g.* App. at p. 38-39; p. 40; p. 46, ll. 2-5). Indeed the Claimant's entire argument at the agency assumed she was a temporary employee and the Claimant never asserted she was in fact a spot laborer. *See Brief and Argument In Support of Claimant's Appeal*, Rec. at p. 68 ("As a matter of fact, Ms. Sladek did not know she no longer had a working relationship with Kelly until after the July phone call.").

The Claimant has made the assertion that no meaningful distinction can be made between temporary employment and spot labor. This would come as a surprise to the very substantial temporary employment industry in Iowa, *e.g.* Iowa Staffing, Advance Services, Kelly Services, Team Staffing Solutions, LA Leasing (Sedona), Labor Ready, Adecco, QPS Employment Group, Aventure Staffing & Professional, PRN Staffing Inc., *etc. etc.*. First off such temporary employers *always* assign the worker to a client. A spot laborer may work for a job broker, or she may work directly for someone who is hiring workers for a specific contract (e.g. banquet work at a conference, or conducting annual inventory for a couple days, or the iconic "sweep up around the place"). Thus a temporary employee always has this dichotomy between who directs her work and who is her employer actually paying her covered wages. A spot laborer often does not have this dichotomy. Similarly a temporary employee who is on active assignment experiences two steps before job loss: loss of assignment and then loss of employee status with the temporary employer. But a spot laborer always has only one step:

loss of assignment is *by definition* loss of employment. A temporary employee has continuing "between assignment" obligations to the temporary employer. For example, requirements that a worker not use illegal drugs, or not work for competitors, would still apply even when not on an active assignment[2]. Not so with spot labor. Plus temporary employers routinely impose a requirement that a worker must keep the employer updated with contact information and at least *respond* to any offers of assignment. It is not uncommon for a temporary employer to find a worker non-responsive to its repeated calls and offers. This is common, for example, if the worker moves and fails to update the temporary employer with contact information, or has decided to quit. And it may happen *even though* the worker had reported back and requested reassignment within three days of the end of the last assignment. What happens is after requesting reassignment and not getting called right away the worker decides to quit. Instead of calling and saying "I quit so don't call me anymore" the worker just stops answering when the employer calls. Happens all the time. Then the temporary employer just gives up after so many attempts to reach the worker, and only then removes them from the list of employees. This would then create the issue of

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2 One must not underestimate the variety of temporary employers. For example, there is an industry which assigns nurses out on a "PRN" basis. The nurse works for the firm but gets assigned to various clients. Between assignments the nurse is required to not do anything that would endanger the license, e.g. use illegal drugs. A spot labor nurse who goes directly to the care facility and is hired directly but only for a specified job or period of time, would have no further professional obligations to the facility once the job/time (and thus the contract of hire) ended.

whether such repeated ignoring of assignments would either be a quit or perhaps misconduct. But no such issue arises with spot labor – because until the offer is *accepted* there is no employment relationship to get severed. Thus temporary and spot employment are different because the contracts of employment are different. The differences at a legal and practical level are profound and that's why there are two different rules dealing with these two very different forms of contracts of employment. Just saying they're the same does not make it so.

The Claimant's argument contradicts the basic scheme of the statute. By statute if a temporary employee loses an assignment and then fails to return to seek another assignment within three days then that is deemed to be a *quit*. But if the loss of the assignment was the separation how can events occurring after that *also* be considered the separation? The answer of course is that the temporary employee is an *employee* of the temporary employment firm, even though under the direction of supervisors at the client firm. The statute says as much. Iowa Code §96.5(1)(j)(3)(a). If the assignment ends and the temporary employee fails to properly notify the temporary employer then this is a quit of the employment with the temporary employment firm – precisely because losing the assignment is not the same as losing employment with the temporary employer. Thus the Claimant here was an employee of Kelly Services, and her employment with that firm did not end just because she lost the ACT assignment. Her employment with Kelly Services did not end until *after* the end of the ACT assignment. This means that the decision by Kelly Services to

end the *assignment* was not a termination of *employment*. Thus the Claimant cannot demonstrate an error in the agencies' conclusion that she quit her *employment* merely by pointing to the fact that the end of the *assignment* was not initiated by her.

The Claimant overlooks not only the statute but also how unfair her suggested process would be to Kelly Services in cases, like this one, where a worker is on a long-term assignment but is employed and paid by Kelly. The Claimant worked at ACT but was paid by Kelly. All her wage credits on this claim are from Kelly Services[3]. So ACT has nothing at stake. Kelly was willing to find her another assignment, but she quit thereby denying them that chance. Why on Earth would Kelly have to be charged for benefits because ACT was not more patient with the Claimant? If she were an employee of ACT then ACT would be on the hook for benefits and ACT would have that added incentive to preserve her employment. By charging Kelly for what Kelly does with Kelly's employees the law encourages Kelly to preserve the employment relationship. Which is exactly what the statute means when it says that it is State policy to "encourage[e] employers to provide more stable Employment." Iowa Code §96.2.

Moreover the Claimant's "assignment = job" argument only works if we treat this situation as having just the one "separation"

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[3] Since she filed for benefits in the third quarter of 2017 her base period is the first quarter of 2017 and the last three quarters of 2016. The testimony shows she worked for Kelly full-time all of 2016, and before she quit in 2017. Her wage records contain no other base period credits. (App. at p. 18 [middle of page under "credit" shows credits on this claim – all Kelly]).

from ACT, and thus treat the Kelly job loss as irrelevant. Under the Claimant's argument she was separated from ACT and the fact that she was *subsequently* separated from Kelly somehow disappears. Even under *Irving* (now legislatively reversed) the fact that "job loss" with one employer was *not* disqualifying would only mean that the Claimant could draw on credits with that employer. It would not mean that she could do whatever she wanted with other employers and still draw on their credits. Yet this is exactly what the Claimant proposes since she claims only the loss of the ACT assignment (where she has *no* credits) is relevant. Let us suppose a more extreme example and apply the Claimant's approach. Instead of hanging up on her supervisor the Claimant drives down to Kelly's office with a baseball bat, busts up the office, and breaks her supervisor's nose. When Kelly fires her by removing her payroll at *Kelly* would it be an answer that the assignment loss was not disqualifying? Of course not. The Claimant would have committed misconduct and this would have caused the only employer actually paying her wages in the base period to discharge her, that is, to remove her from its list of active employees eligible for assignment. This is disqualifying, and to argue otherwise, as the Claimant's approach *must* do, would be absurd and "[i]n construing legislative enactments, courts should avoid strained, impractical, or absurd results." *Welch v. IDES,* 421 N.W.2d 150, 155 (Iowa App. 1988); *see generally Brakke v. Iowa DNR*, 897 NW 2d 522 (Iowa 2017)(discussing absurdity doctrine at length). The Claimant's approach charges Kelly for what happened at ACT[4], and

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[4] For example, suppose the Claimant quit the ACT assignment

lets the Claimant off the hook for *anything* she might thereafter do at Kelly.

The Claimant wants temporary employment to be reduced to one obligation: call within three days. That's it. If you do this you can curse your employer, you can threaten, you can refuse any number of assignments, you can refuse to pick up the phone ever again, you can call right back and say "I quit." Since the refusal of work disqualification only applies during the benefit year, these temporary workers could file their initial claim for benefits *after* being notified they were no longer on the assignment list and have no issue of refusing work. And since a refusal of work disqualification only applies to definite refusals the worker could just decide to stop returning calls and not be disqualified for a work refusal even after filing for benefits. 871 IAC 24.24(1). And since the Claimant says the job with the temporary employer is not really the job, specifically saying "I quit" would not *really* be a quit. Thus the Claimant would have it that the persistently nonresponsive who have no interest in continuing to work for the only employer who paid base period wages still would not be disqualified for quitting. This creates the specter of a worker being able to draw on wage credits with the temporary employer when she tells them "I quit" or simply refuses to even take their calls. The added expense of paying unemployment to every

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because the job conditions were unsafe. While awaiting reassignment she could collect benefits. But she then quits Kelly to move to another state despite the fact that Kelly kept her on and was looking for other assignments. In such a case Claimant's rule would charge Kelly for the job environment at ACT. And the purpose of the law to supply "stable employment" would not be advanced at all.

incommunicado worker burdens the operations of these employers in this state and thereby certainly does not advance the policy of reducing unemployment.

Although it may not be obvious, the area being very specialized and technical, the argument the Claimant makes is also actually detrimental to many claimants working for temporary employment firms. Often a claimant loses an assignment for reasons that might be considered misconduct, typically excessive absenteeism. Other claimants may quit for good reasons which are not, however, attributable to the employer. What happens is a worker has some personal transportation issues, or family issues, that cause them to miss a lot of work. They either quit, or get fired for absenteeism. This is normally disqualifying. But if the worker is a temporary worker and loses only the *assignment* while remaining eligible for reassignment, then there is no disqualification for absenteeism, only a lack of availability which goes away once the attendance issues are resolved. *See e.g. Rovertis Williams v. L.A. Leasing*, 18B-UI-04637 (EAB June 4, 2018)[5] (finding no disqualifying quit since "Mr. Williams only quit the assignment on February 27, 2018 [and q]uitting an assignment is not commensurate with quitting the employment agency.") The same thing happens when a Claimant quits *an assignment* for reasons like conflicts at home needing attention, lack of transportation, or because she just doesn't like the work at the assignment. If the worker remains available for

5 Available online: http://uidecisions.iowaworkforcedevelopment.gov/solr/ui-decisions/browse?q=04637

reassignment no quit disqualification is imposed. What this Claimant proposes is that the disqualification will rise and fall on the loss of the assignment, and not the continued employment from the temporary firm. This creates for every temp worker multiple separations that might be disqualifying. Currently if the worker reports within three days of leaving an assignment and is not separated from the temporary employment firm then there is no possibility of disqualification based on how the *assignment* ended. But the Claimant would greatly expand possible disqualification based on job assignment loss beyond simply not reporting in. The Claimant would create a possible job-loss disqualification every time a claimant loses or quits an assignment regardless of whether they remain on payroll with the temporary employer. This absolutely does no favor for claimants.

Another ill-effect for claimants under the Claimant's argument arises in exactly the fact pattern at bar. When a claimant is on total layoff, even though still on payroll with the regular employer, then that claimant must seek work to get benefits unless the layoff was for a known period of time of less than four weeks. 871 IAC 24.22(2)(c); 871 IAC 24.23(20). On the other hand, if a worker is working reduced hours for her regular employer (partial layoff), then the worker can receive partial unemployment benefits, and need not look for more work so long as she is on the reduced schedule with her regular employer. The work seeking requirement is "waived if the individual is deemed partially unemployed, while employed at the individual's regular job." Iowa Code §96.4(3). This means that following the end

of the ACT assignment the Claimant, who had full-time wage credits, could have accepted part-time assignments from Kelly and still collected partial benefits. If she turned down the part-time assignments, assuming the pay was low enough, she would not be disqualified but when partial benefits and partial-pay are added together she'd make more than with benefits alone. Plus she would *not* be required to look for other work while working part-time since she'd be working a reduced schedule while in the employ of her regular employer (Kelly). Of course, her being on partial rather than regular benefits would also reduce Kelly's charges. So Kelly would have an incentive to offer part-time assignments if they came up, and the Claimant would have an incentive to accept. Meanwhile Kelly would still have an incentive to find full-time assignments so that it would no longer be paying even partial benefits. So under the current system the Claimant could work part-time, collect partial benefits, and wait for Kelly to find her full time work without the burden of herself having to seek work. Everyone wins. But under the Claimant's system she would have to seek work regardless. Under Claimant's system she is not working a reduced work schedule while working her "regular job" (ACT assignment) at Kelly. Thus she would have to continue to make weekly job searches with employers other than Kelly if she was to collect even partial benefits. The Claimant thus puts a greater burden on claimants in the exact position she found herself at the end of the ACT assignment.

Yet again, the expansion of the job-loss disqualification could often burden the interests of everyone involved. Suppose a worker

with Kelly loses an assignment with Employer A. Under the agencies' approach if the worker calls back in, seeks reassignment, and does not quit then the worker remains in the employ of Kelly. Then suppose, as very often happens, the worker receives and accepts a permanent offer from Employer B. Kelly then calls up with an assignment at Employer C, but the worker tells Kelly she has accepted a full-time permanent job and asks to be removed from the assignment list. The worker thus quits Kelly. Kelly congratulates her and everyone moves on. Then the worker is quickly laid off from Employer B and files for benefits, with Kelly in the base period. The separation from Kelly would have to be adjudicated[6]. Under the agencies' approach this was a quit for other employment. The worker would get benefits. And Kelly would not be charged for them. The balancing fund would be charged. Iowa Code §96.5(1)(a). Switch to the Claimant's approach. Kelly would protest the claim, and the issue would be now become how the assignment with Employer A was lost since the Claimant says this is the only "separation." But the worker didn't quit until she had a job in hand; why deny her benefits based on the *first* assignment loss? And if the assignment loss was not of a disqualifying nature why charge Kelly when it would have assigned the worker to Employer C had the worker not taken another job? This is exactly the sort of situation that the Code contemplates will be charged to the fund, benefiting the claimant, the employer and the

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6 The refusal of the assignment with Employer C would clearly be for good cause, and this would leave the Kelly separation as the issue. Plus any refusal predating the filing for benefits would not be disqualifying regardless.

public. The Claimant would again take an "everyone wins" scenario, and create a loser for no policy reason that can be detected. In a remarkable trifecta the Claimant makes arguments contrary to express statutory provisions, and unfair to both claimants and employers.

With an example one can see how this all fits together in *Iowa*. Joe is a long-time worker for John Deere. He is full-time. Joe is laid off and immediately files for benefits in April of 2017. While on benefits he signs up with Adecco, a temporary employer, and takes some part-time assignments. After a few assignments he tells Adecco that he will no longer be accepting assignments, thereby quitting Adecco. He would then be denied the ability to draw on the wage credits from Adecco. But Joe's 2017 claim is not based on any credits with Adecco and so his inability to draw on those credits has no effect on his ability to draw benefits the *first* year. So then after quitting Adecco Joe gets a job with Hy Vee for several months, but is laid off from Hy Vee. If by April 2018 Joe is still unemployed he can file another claim for benefits. If he files an April 201**8** claim (called a "subsequent benefit year claim") then his base period will be all of 2017. It will include one quarter of wages from John Deere, and then whoever Joe worked for in 2017 including Adecco and Hy Vee. Since he quit Adecco he will not be able to draw on Adecco credits as set out by the Iowa Supreme Court unless he earned sufficient wages at Hy Vee to requalify. But regardless of Adecco he will have that one quarter of John Deere credits and the Hy Vee credits. In fairness to the employer he quit that employer will not be charged on the

subsequent benefit year claim (even if he requalified those credits will be charged to the fund). In the case of supplemental employment Joe does *not* face the situation where once he quits Adecco he is unable to collect benefits. All he faces is that if he has to rely on Adecco credits in order to get benefits in the first place then he shouldn't be quitting Adecco, or he should not file until he has reattached to the labor market by earning requalifying wages. But if he has a significant attachment to the labor market other than Adecco then he isn't significantly harmed by quitting Adecco. The "trap" described by *Mbong v. New Horizon's Nursing*, 608 N.W.2d 890 (Minn. App. 2000) is avoided in Iowa by already established law.

The cases cited by the Claimant are all off base. First it is no surprise that back in 1981 the Minnesota court found a worker who worked *one day assignments* that were paid out at the *end of each day* did not have to report back the next day. *Smith v. Employer's Overload*, 314 N.W.2d 220 (1981). *Smith* is a typical example of spot labor. You work a day, you're paid that day. The contract ends that day. You're a day laborer. But this Claimant is no day laborer. She worked the same assignment for 18 months, not one day. And her contract of employment provided that she had continuing obligations following the end of her assignment. The contract in *Smith* was a spot labor contract, and Iowa has a rule on that situation, and there is thus no need to look further. It is understood in Iowa that day laborers are engaging in spot labor, and that they have no continuing obligations at the end of that day. *E.g. Woodley v. Des Moines Cold*

Storage Co., Inc., 09A-UI-09225 (IWD 6/21/2009).[7] The question in the case at bar is whether this Claimant was a spot laborer in the first place. And citation to *Smith* merely begs this question. In short, *Smith* is spot labor case, and substantial evidence supports that this case is not a spot labor case.

Second, the case at bar is nothing like *Mbong*. First, *Mbong* also dealt with one day assignments, and relied heavily on the spot labor analysis of *Smith*. Second, the evil sought to be avoided in *Mbong* is not present here. In *Mbong* the claimant was disqualified by the agency for quitting odd jobs he had taken after filing for benefits. The court decided this was wrong. The *Mbong* case is concerned with folks getting punished for taking work while on benefits which work they later quit in order to focus on their job hunt. In Iowa *Welch v. IDJS,* 421 N.W.2d 150 (Iowa App. 1998) makes clear that quits for such part-time odd jobs during the benefit year only affect the credits earned at that job. But unlike *Mbong* the Claimant did not quit an odd one-day job during her benefit year. She quit her regular full-time employer, that is, the employer who had been supplying her full-time work *throughout* the entire base period. And she quit not while on benefits but before she started claiming. The evil that *Mbong* sought to avoid was punishing a worker for taking odd jobs while on benefits, thus reducing the liability of base period employers, and then quitting to look for work. That concern plays absolutely no role in this fact pattern.

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[7] Available online:
http://uidecisions.iowaworkforcedevelopment.gov/solr/ui-decisions/browse?q=+09A-UI-09225&fq=year%3A%222009%22

Here the Claimant worked with Kelly throughout her base period and *all* of her base period credits come from full-time work she received from Kelly. Thus if we applied the approach of only denying her the ability to draw on credits with Kelly she'd be in exactly the same place as a total disqualification: Kelly *is* all her credits. (App at p. 18). So according to the agencies what was this Claimant expected to do once she lost her assignment? If she did not quit Kelly, and did call within three days for a reassignment, then she could collect full benefits for any week that she didn't actually work. 871 IAC 24.1(139(c)("Week of total unemployment [is] [a] week in which an individual performs no work and earns no wages."). And for any week during which she worked less than full-time hours she might be able to collect partial benefits, depending on the math of how much she was paid. Iowa Code §96.3(3). During those partial weeks she wouldn't have to look for work. 871 IAC 24.1(139)(b). If Kelly, or for that matter any other employer, called her up with work and she turned it down then she might be disqualified if the offer was suitable and she didn't have good cause for turning it down. Merely being temporary does not mean the work offer is automatically unsuitable. *Norland v. Iowa Department of Job Service*, 412 N.W.2d 904, 910 (Iowa 1987). So in *Iowa* in cases like this the supposed trap is: when you lose your long term assignment call within three days, don't quit your temp employer, and you will continue to be eligible for benefits for any week you don't work. Meanwhile if you quit supplement part-time employment then credits from that employer will not be charged

to the account, but you won't be disqualified generally. Iowa Code §96.5(12). There is no trap[8].

Even less does *Cintemp, Inc. v. Unemployment Insurance Review Board,* 717 N.E.2d 988 (Ind. Ct. App. 1999) have anything to do with this case. *Cintemp* involves what is known in the industry as "temp-to-hire." In that situation the worker is assigned to a client with the expectation that if all works out the worker will stop working for the temporary firm and start working for the client. The contract of employment provides that the job with the temporary employer ends when the *permanent job* with the client firm begins. Once the worker starts working *directly* for the client then the client will start reporting that worker's wages to Workforce, and the temporary firm will cease reporting wages for that worker. In *Cintemp* the workers where temp-to-hire. They were successful and left the temporary firm when they were hired permanently by the clients. The clients then had layoffs and the workers filed for benefits. Since it had paid base period wages the temporary employer, Cintemp, argued that the claimants had quit Cintemp when they went to the permanent job. *No one* contended that the workers remained employees with Cintemp once they started working as regular employees of the

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[8] To the extent that the Claimant wants to avoid the "trap" of possibly being disqualified if she fails to accept temporary work while on benefits the Claimant will have to get *Norland v. Iowa Department of Job Service,* 412 N.W.2d 904, 910 (Iowa 1987) reversed. *Norland* affirmed an agency determination of refusal of suitable work even though the offer was of temporary work. The Court refused to find that all temporary work is *always* unsuitable. The case at bar, however, is a quit case. And on quitting the law cited in the text sets out the rule.

clients. The issue in *Cintemp* was the nature of the undisputed separation that occurred when the claimants left Cintemp to go work as direct employees of the client. The agency and the court found that the contract of employment with Cintemp ended by its own terms once the workers were hired by the clients. Key to that decision was that "when asked whether the Claimants were free to choose to accept permanent employment with the company or to continue working for the company as a CTI employee, ... CTI's representative, repeatedly testified, 'No, probably not.'" *Cintemp* at 992. Further in *Cintemp* the temporary employer "testified that once an assignment with one of CTI's corporate clients had ended, either for lack of work or some other reason, they were 'no longer a CTI employee....'" *Id.* Since the resulting separation was neither a quit nor a discharge no disqualification was imposed. A similar result follows in a successful temp-to-hire in Iowa. The Iowa agencies would either find that it was an example of completing the contract of hire under rule 24.26(22), or a case where the claimant would be allowed benefits (and the fund charged) because she "left employment in good faith for the sole purpose of accepting other or better employment..." Iowa Code §96.5(1)(a).

But this is not a successful temp-to-hire case. This is not a case where the Claimant left Kelly, pursuant to the terms of the contract with Kelly, only because she had been hired by ACT. If it were the Board would have allowed benefits, likely under Iowa Code

§96.5(1)(a)[9]. Instead, in the case at bar this is not even an issue. Everyone agrees that the Claimant was still an employee of Kelly when she was on assignment with at ACT. And she never started as a direct employee of ACT. There is no occasion to address whether the start of the permanent employment with ACT means that the Claimant had quit Kelly. It just didn't happen. Moreover unlike *Cintemp* there is *no evidence* that loss of the assignment with ACT automatically means the employment with Kelly also ends. Had there been such testimony the Board most certainly would have found spot labor and allowed benefits. But there just isn't any such testimony, and *Cintemp* is, in a word, inapposite.

Since the Claimant was an employee of Kelly Services it was no error of law to tie her disqualification to her separation from Kelly Services.

II. The Board Did Not Err When Concluding That The Claimant Quit Her Job With Kelly Services

A. PRESERVATION OF ERROR: The Board agrees that the Claimant preserved error on the issue of whether the agency was

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9 In "other employment" cases benefits are still allowed but the fund is charged. This would mean the temp-to-hire employers wouldn't be charged for what happened at the subsequent employer, and yet the claimant would still get full benefits. Analytically this is perhaps less defensible than just calling it a "contract end" case (where benefits would also be allowed), but it is also perhaps more fair. Nevertheless, the issue does not here arise as this is not a successful temp-to-hire case.

wholly unjustified in finding the Claimant quit her employment with Kelly Services.

B. STANDARD OF REVIEW: The standard of review is the same a set out in argument I.

C. LEGAL STANDARDS: The Board, in affirming the Administrative Law Judge, found that the Claimant quit without good cause attributable to the Employer. Iowa Code §96.5(1). Generally a quit is defined to be "a termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces." 871 IAC 24.1(113)(b). "[Q]uitting requires an intention to terminate employment accompanied by an overt act carrying out the intent." *FDL Foods, Inc. v. Employment Appeal Board*, 460 N.W.2d 885, 887 (Iowa App. 1990), *accord Peck v. Employment Appeal Board*, 492 N.W.2d 438 (Iowa App. 1992).

The issue on this appeal is whether the Board's findings of fact are supported by substantial evidence and, if so, whether the application of law to fact in this case, that is, the Board's conclusion that the Claimant was disqualified for quitting was "wholly unjustifiable". Iowa Code §17A.19(10)(m).

D. THE BOARD DID NOT ERR IN FINDING THAT THE CLAIMANT QUIT HER JOB WITH THE TEMPORARY EMPLOYER KELLY SERVICES: Recognizing that the end of an assignment at a client is not the same as the end of the employment with the temporary employment firm, the next issue in this case then becomes

whether the agencies erred in concluding that the Claimant quit her job with Kelly Services.

As an initial matter the agencies did **not** find that the Petitioner was disqualified for a failure to notify the employer of the end of assignment and to request reassignment within 3 days under Iowa Code §96.5(1)(j). What they found was that the Claimant knew that loss of her assignment would not mean the end of her employment, and that she had to speak with *Kelly Services* if she wanted another assignment from Kelly Services. Her knowledge of these facts, coupled with the hanging up and her four-week failure to report was then taken *on the facts* to indicate that the Claimant quit her job with Kelly Services. The agencies did not apply 96.5(1)(j) to this case to find a "statutory" quit, but rather found that the knowing actions of hanging up and then failure to report for weeks showed, under the circumstances, that the Claimant actually quit the temporary employer. Thus argument over the meaning of the statutory quit provision is entirely beside the point. That is not the basis of the disqualification. And Iowa Code §96.5(1)(j) certainly does not say that once you call in and request reassignment you are incapable of quitting thereafter. Rather, that paragraph has created conditions which, when satisfied, constitute a quit by operation of law. The Code has not limited the terms which the parties can have in a contract of employment, including continuation of employment past the ending of the assignment. This being the case, of course you can quit ongoing employment after you have properly called in and requested more assignments. You get a permanent job or you decide to move,

or you decide to go back to school full time, or you win the lottery, and you call Kelly Services, and you say "Take me off the assignment list, I quit." What else could that be but a quit? Fulfillment of the terms of Iowa Code §96.5(1)(j) only means that the worker cannot be disqualified for *failing* to fulfill those terms. It does not yield some new exotic form of "quit proof" employment.

This is a case about reasonable inferences that can be drawn from the evidence. The rule, of course, is that "[e]ven when the facts are not in dispute or contradicted, if reasonable minds might draw different inferences from them a jury question is engendered." I.R. App. Pro. 6.904(3)(q). Here substantial evidence - including reasonably available inferences from uncontradicted evidence - supports the conclusion that the Claimant quit her job with Kelly Services.

INTENT TO QUIT: As far as intent to quit the Claimant argues that because she denies she intended to quit we can all just pack up and go home. That, she says, in the end of the matter. Her claim is that she didn't intend to quit, that we know because she says so, and that therefore it must be that she did not quit. It is true – it is always true - that mind reading is not admitted into evidence and the claimant has the sole first-hand access to her state of mind. In this sense her description of her subjective intent could not be directly contradicted. It does not follow from this that it was error to disbelieve it.

The rule has long been that uncontradicted evidence is not, by that alone, credible evidence. "The court is not required to accept as a verity uncontradicted testimony, but might well scrutinize closely such testimony as to its credibility, taking into consideration all the

circumstances throwing light thereon, such as the interest of the witnesses, remote or otherwise." *Kaiser v. Stathas,* 263 N.W.2d 522, 526 (Iowa 1978); *accord* I.R. App. Pro. 6.904(3)(q)("Even when the facts are not in dispute or contradicted, if reasonable minds might draw different inferences from them a jury question is engendered."). Thus in an unemployment case where the claimant testified without contradiction that he did not intend to fall asleep the Court stated "we cannot accept the view of the district court or the court of appeals that the agency was compelled as a matter of law to render such a finding." *Hurtado v. Iowa Dept. of Job Service,* 393 N.W.2d 309, 311 (Iowa 1986). This was exactly because the agency "need not have accepted as a verity Claimant's testimony concerning the reasons why he was sleeping on the job." *Id.* Thus the *Hurtado* court affirmed the agency finding of "deliberate sleeping on the job in violation of company work rules" contrary to Mr. Hurtado's uncontradicted testimony that he did not intend to fall asleep. Similarly the agencies here rejected a denial of intent to quit that was not directly contradicted. As in *Hurtado* the Administrative Law Judge and the Board merely took the view that actions speak louder than words. Thus they made the determination that "claimant hanging up on the employer and ceasing contact for multiple weeks demonstrates an intent to end her employment relationship with the temporary staffing agency." (App. at p. 62). The Claimant demonstrated her "intent to end her employment relationship" by taking these overt actions. The agencies concluded that Claimant's actions of ignoring the Employer's policy requiring her to request reassignment within three days by not requesting reassignment at the time she was told the assignment

ended, of hanging up on the Employer, and then making no contact for *four weeks* was evidence of her intent to quit[10]. This was a reasonably available inference.

It is true that one might conclude from this that the Claimant was just confused about whether she should ask for work. But equally, indeed more forcefully, one could conclude that the Claimant decided she'd had enough of Kelly Services. In particular we have an Employer who has a specific policy stating that failure to request reassignment within three days is deemed a quit. Now regardless of what the statute says, and regardless of whether this policy would be binding on the agencies, the fact is the Employer had such a policy. The Claimant thus knew that the loss of an assignment was not loss of employment with Kelly. She then not only did not request reassignment within the three days of the policy, but she didn't contact the Employer for four *weeks*. Further, the record supports was that she only wanted the ACT job, but could not, try as she might, meet the job requirements. So she stopped seeking any assignment at all. A reasonable mind could find that the Claimant's approach was "ACT or nothing," at least until she changed her mind after a month without income. Her showing up at *ACT* and trying to convince them to hire her directly is completely consistent with the finding that she no longer wanted to be assigned just anywhere and this is why she decided to quit *Kelly Services*. When added to the undeniable fact

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10 Again the failure to contact was taken as evidence of the intent to quit. Disqualification was not based on a failure to request reassignment within 3 days constituting a "deemed" quit as a matter of law, but rather was based on an actual quit as a matter of fact.

that the Claimant was upset over the end of the ACT assignment, and that she hung up on Kelly and *then* did not call back for weeks, it is not an *error of law* to conclude that the Claimant intended to quit. The mere fact that she eventually regretted her choice does not alter this conclusion. *Langley v. Employment Appeal Board*, 490 N.W.2d 300, 304 (Iowa App. 1992). And just because the Claimant now claims she did not intend to quit this does not alter the 75 year-old rule that "where the facts are in dispute, **or where reasonable minds may differ on the inferences to be drawn from the proven facts** and circumstances, the findings of the [EAB] are conclusive." *Wolfe v. Iowa Unemployment Comp. Comm'n*, 232 Iowa 1254, 7 N.W.2d 799, 800-801 (Iowa 1943) (emphasis added).

OVERT ACT OF QUITTING: As far as "overt act" the evidence is much the same as with the conclusion on intent. The Claimant hung up on her superior in reaction to being told that she was being removed from an assignment. She then failed to contact the Employer for weeks to let it know she was available for reassignment. Such actions are reasonably taken to be overt acts of quitting.

In order to quit no "magic words" or actions are required. Just at a gut level what does it mean to "quit?" When referring to employment it means "to give up employment, stop working: leave." *Webster's Third New International Dictionary, Unabridged* (1961). It is synonymous with "abandon, desert, forsake, ...leave." *Roget's Thesaurus of English Words and Phrases*, 624. "Relinquishment" (Prabhat Prakashan, pub. January 13, 2017). The very nature of quitting something is that you quit doing it. And there is no need to

announce this – you can quit by just quitting. Thus one aspect of quitting work will always be that you quit working. So if you storm out in anger, but *then show up the next day* this may very well not be a quit because you are offering your services for pay. *See Peck v. Employment Appeal Board*, 492 N.W.2d 438 (Iowa App. 1992). But by the same token if you hang up in anger, and then remain out of contact for weeks contrary to policy, and instead seek to get hired directly at the firm you had been assigned to, you certainly have "quit" seeking to work at *Kelly* and it is no error of law to find this to be an overt act of quitting when coupled with the Claimant's knowledge of the Employer's policies.

In the recent case of *Bunger v. EAB,* No. 17-0560 (Iowa App. 11-22-2017) a lightly scheduled claimant did not come to work when scheduled, and failed to contact the employer for several months. Mr. Bunger claimed confusion, in particular, that he understood the employer would contact him if he was scheduled. The Court of Appeals found substantial evidence that the Employer's policy required workers to check the schedule. This corresponds to the policy here that the worker must timely request reassignment. Furthermore the Court in *Bunger* found that *inaction* can be an "overt act" of quitting. "True, Bunger's non-appearance for his August shift and his lack of initiative in calling his employer could be deemed a failure to act. But, as the court stated in *Irving*, 'the volitional act of refusing to' do something may 'be considered a voluntary quit.'" *Bunger*, slip op. at 4. This rule applies with equal force here. It is true that the "lack of initiative" in *Bunger* stretched

out over more time than here. But *Bunger* also lacked the act of hanging up in anger, the employment in *Bunger* was very occasional, and the policy in *Bunger* was less clear than the one here. And, in any event, the question is one of reasonably available inferences and, as in *Bunger,* the fact that a differing inference *might* be justified is not sufficient for reversal.

There being substantial evidence that the Claimant quit the question would normally now proceed to whether she had proven good cause attributable to the Employer for her quit. The Claimant however has at no point asserted that she quit, much less that she had good cause for quitting, much less that the cause was attributable to the Employer. She made no such assertion before the District Court, the District Court did not address good cause for *quitting* in its decision, and the Claimant did not ask the Court to expand its findings to address the issue of good cause for quitting. Moreover the Claimant makes no assertion of good cause for *quitting* in her opening brief. The issue is thus waived, and the Board does not address it now even though it had done so below. *E.g. O'Hara v. State*, 642 NW2d 303, 314 (Iowa 2002); *Sun Valley Iowa Lake Ass'n v. Anderson*, 551 NW2d 621, 642 (Iowa 1996). Since there is substantial evidence that the Claimant in fact intended to quit working for Kelly Services, since she took overt acts in furtherance of that intent, and since she asserts no good cause for doing so it was no error of law to disqualify her for quitting her job with Kelly Services without good cause attributable to Kelly for doing so.

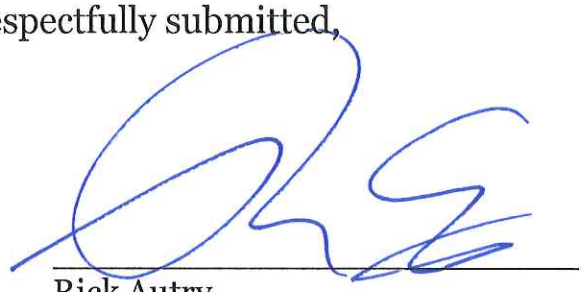
CONCLUSION

The district court did not err in affirming the Board's affirmance of the Administrative Law Judge's disallowance of unemployment benefits.

REQUEST FOR ORAL ARGUMENT

Appellee requests to be heard orally at the time of final submission of this matter.

Respectfully submitted,



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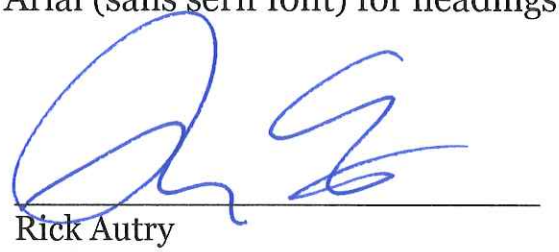
CERTIFICATE OF COMPLIANCE

This Brief complies with the type-volume limitation of I.R.A.P. 6.903(1)(g)(1) because this brief contains 11,442 words, excluding the parts exempted by that rule.

This Brief complies with the typeface and typestyle requirements of I.R.A.P. 6.903(1)(e)-(f) because this brief in printed in 14-point Georgia for the body and 14-point Arial (sans serif font) for headings.



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COST CERTIFICATE

I hereby certify that the actual cost of producing the necessary copies of the preceding Appellee's Final Brief was the sum of $0.00.

Rick Autry
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