IN THE SUPREME COURT OF IOWA
NO. 18-0981

TERESA L. SLADEK,
Appellant,

v.

EMPLOYMENT APPEAL BOARD
and KELLY SERVICES USA LLC,
Appellees.

On Appeal from the Iowa District Court for Johnson County,
Sixth Judicial District of Iowa, The Honorable Chad Kepros
Johnson County Case No. CVCV079516

APPELLANT'S FINAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Was there an ongoing employment relationship between Ms. Sladek and Kelly Services after Ms. Sladek's ACT assignment concluded?

Cases
Anderson v. Douglas & Lomason Co., 540 N.W. 2d 277, 281 (Iowa 1995)
Bradshaw v. Cedar Rapids Airport Comm'n, 903 N.W.2d 355, 361 (Iowa Ct. App. 2017)
Doggett v. Heritage Concepts, Inc., 298 N.W.2d 310, 311 (Iowa 1980)
Gabrielson v. State, 342 N.W.2d 867, 870 (Iowa 1984)
Haggin v. Derby, 229 N.W. 257, 260 (Iowa 1930)
Heggen v. Clover Leaf Coal & Mining Co., 253 N.W. 140, 141 (Iowa 1934)
Wernimont v. Wernimont, 686 N.W.2d 186, 190 (Iowa 2004)

Statutes
Iowa Code § 96.19

II. Did the EAB make a legal error that is reviewed de novo when it found that Ms. Sladek was obligated to affirmatively request a new assignment in order to satisfy Section 96.5(1)(j)?

Cases
ABC Disposal Sys., Inc. v. Dep't of Natural Res., 681 N.W. 2d 596, 602 (Iowa 2004)
Birchansky Real Estate, L.C. v. Iowa Dep't of Pub. Health, 737 N.W.2d 134, 138 (Iowa 2007)
Bridgestone/Firestone, Inc. v. EAB, 570 N.W.2d 85, 96 (Iowa 1997)
Irving v. EAB, 883 N.W.2d 179, 185 (Iowa 2016
Peck v. EAB, 492 N.W.2d 438, 440 (Iowa Ct. App. 1992
Renda v. Iowa Civil Rights Comm'n, 784 N.W.2d 8, 11 (Iowa 2010)
Sharp v. EAB, 479 N.W.2d 280, 283 (Iowa 1991)

Statutes
Iowa Code § 96.5(1)(j)
Iowa Code § 96.5(1)(j)(1)
Iowa Code § 17A.19(10)(c)
Iowa Code § 17A.19(10)(m)

Other Authorities

Arthur E. Bonfield, Amendments to Iowa Procedure, Report on Selected Provisions to Iowa State Bar Association and Iowa State Government 62 (1998)

III. Did Kelly Services fail to meet its burden of proving that Ms. Sladek made an overt act to quit her job with Kelly Services?

Cases

Bartlet v. EAB, 494 N.W.2d 684, 686 (Iowa 1993)

Bunger v. EAB, No. 17-0560, 2017 WL 6027768, at *2 (Iowa Ct. App., Nov. 22, 2017)

Irving v. EAB, 883 N.W.2d 179, 185 (Iowa 2016)

Statutes

Iowa Code § 96.6(2)

ARGUMENT

I. There was no ongoing employment relationship between Ms. Sladek and Kelly Services after Ms. Sladek's ACT assignment concluded because there was no underlying consideration supporting employment during periods of non-assignment.

The arrangement between Ms. Sladek and Kelly Services lacks the necessary consideration to support an employment contract during periods of non-assignment. This lack of consideration supporting the arrangement meant that Ms. Sladek could not have "quit" Kelly Services following the end of the ACT assignment because there was no ongoing employment to quit. Employment Appeal Board (EAB) claims that the "employment" persisted beyond the completion of the ACT assignment and into periods of un-paid non-assignment. EAB's proposition is incorrect and violates basic contract law principles.

It is a well-established legal principle that to enforce a contract according to its terms, the contract *must* contain legally sufficient consideration passed between the parties. *Heggen v. Clover Leaf Coal & Mining Co.*, 253 N.W. 140, 141 (Iowa 1934). Either a benefit to a promisor or a detriment to a promisee constitutes consideration. *Doggett v. Heritage Concepts, Inc.*, 298 N.W.2d 310, 311 (Iowa 1980). The form and relative adequacy of the consideration will vary depending on the context of the contractual agreement, but all enforceable contracts contain some form of consideration exchanged between the parties. When searching for

sufficient consideration in arrangements, courts will interpret the contract in accordance with the parties' intent based on the language used in the agreement. *Bradshaw v. Cedar Rapids Airport Comm'n*, 903 N.W.2d 355, 361 (Iowa Ct. App. 2017).

The moment Kelly Services and ACT chose to terminate Ms. Sladek's assignment and Kelly Services told Ms. Sladek to no longer report to ACT for work without offering an alternate assignment, the employment relationship ended because the obligations of both the employee and employer ended. The existence of an employment relationship depends on the exchange of wages for services. *See* Iowa Code § 96.19 ("[E]mployment means service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, expressed or implied." (internal quotation marks omitted)). The statute makes clear that services performed for wages is at the heart of any employment relationship. Because Kelly Services does not guarantee or pay wages during periods of non-assignment, no employment relationship existed after Ms. Sladek's assignment at ACT concluded. While EAB attempts to simplify Ms. Sladek's stance by depicting her argument as "assignment = job," this over-simplification fails to address the core component of any employment relationship—the exchange of services for compensation (typically in the form of wages). Appellee Brief 29. Despite EAB's suggestion otherwise, the end date of Ms. Sladek's ACT assignment is relevant

because it marked the end of her wages from Kelly Services and thus the conclusion of the underlying consideration supporting the arrangement.

While neither party contests the presence of an employment relationship existing between Ms. Sladek and Kelly Services during the time Ms. Sladek was collecting wages from Kelly Services for her ACT assignment, Ms. Sladek's employment status after the conclusion of the ACT assignment is disputed. Despite this disagreement regarding her employment status during her period of non-assignment, one fact remains clear after evaluating the arrangement: Ms. Sladek received *no* wages from Kelly Services during the periods of non-assignment following the ACT assignment. This lack of underlying consideration thus ended the previous employment relationship between Ms. Sladek and Kelly Services. Had Ms. Sladek continued to collect wages after her assignment with ACT discontinued, the employee-employer relationship would have persisted. However, the lack of consideration in the form of wages between Kelly Services and Ms. Sladek post-ACT assignment meant that she was unemployed and thus could not "quit."

The arrangement between Ms. Sladek and Kelly Services does not demonstrate employer intent to retain Ms. Sladek as an employee during periods of non-assignment because Ms. Sladek is not entitled to collect wages during these periods. Establishing the employee-employer relationship includes the employer's

responsibility to pay wages—a responsibility noticeably absent during periods of non-assignment in the arrangement between Ms. Sladek and Kelly Services. *See Wernimont v. Wernimont*, 686 N.W.2d 186, 190 (Iowa 2004) (citing *Gabrielson v. State*, 342 N.W.2d 867, 870 (Iowa 1984)). Contrary to this established requirement, the arrangement between the parties lays out very clearly that Kelly Services has no obligation to provide Ms. Sladek with employment and no obligation to provide wages during periods of non-assignment. *See* App. p. 15.

Kelly Services expressly limited its responsibilities to Ms. Sladek during the periods when Ms. Sladek was not assigned to a project and thus not collecting wages. The basics of the arrangement are set out in Kelly's employment application. These express limitations include: "I understand I *may* be offered employment with Kelly Services, Inc. . . subject to . . . Kelly's ability to find suitable assignments for me . . ." (emphasis added); "No Kelly representative has the authority to guarantee employment for any specific period of time or to make any agreement contrary to the foregoing (with the exception of Kelly's President and CEO, and then only in writing);" and, "Kelly will pay me for my work while assigned to Kelly's customer." App. at 15. What these provisions communicate is the unwillingness of Kelly Services to provide any type of wages during Ms. Sladek's periods of non-assignment or any enforceable promise about future assignments.

The legal significance of this arrangement is that no employment contract exists during periods of non-assignment because no consideration (or expectation of consideration) is exchanged between the parties during periods of non-assignment. While EAB may counter by claiming the potential future placement of Ms. Sladek to future projects constitutes sufficient consideration to maintain the employee-employer relationship during periods of non-assignment, the limiting language in the arrangement eliminates Kelly Service's obligation to provide Ms. Sladek's with wages—the primary form of consideration underlying the arrangement—or any guarantees of future assignments during periods of non-assignment. This absence of demonstrated intent to maintain the employment relationship during periods of non-assignment under the written employment agreement supports the position that Ms. Sladek was never afforded the opportunity to quit because her employment had ended when the underlying consideration supporting the arrangement ceased.

The arrangement set forth in the employment application incorrectly classifies Ms. Sladek as an "at-will" employee because the arrangement purports to create an "at-will" employment relationship between the parties despite no underlying consideration supporting the "at-will" relationship during periods of non-assignment. This failure to provide consideration during these non-assignment periods reflects the intent of the employer to discontinue the "at-will" employment

relationship upon conclusion of an assignment preventing Ms. Sladek from "quitting" Kelly Services after her ACT assignment ended. The doctrine of employment "at-will" is a judicially created presumption utilized when arrangements are silent as to duration. *Anderson v. Douglas & Lomason Co.*, 540 N.W.2d 277, 281 (Iowa 1995). Despite the arrangement labeling this employment relationship as "at-will," the language includes defined periods when the arrangement remains active: "the duration of any assignment I accept depends on the needs of Kelly's customer and may be canceled at any time by Kelly or the customer." App. p. 15. In addition to interpreting and construing an arrangement in accordance with the parties' intent as evidenced by the language, the court has the duty to place itself in the circumstances as the parties viewed them. *Haggin v. Derby*, 229 N.W. 257, 260 (Iowa 1930). This includes considering the nature of the arrangement along with the facts and circumstances surrounding the execution of the arrangement. *Id.*

Based on the circumstances of the parties and the language of the arrangement, Ms. Sladek had no expectation of future employment or wages from Kelly Services during periods of non-assignment. In addition to the lack of any expectation and despite the "at-will" label attached to Ms. Sladek's employment relationship, the facts and circumstances surrounding the execution of the arrangement suggest no employment relationship continued after the conclusion of

the ACT assignment because no underlying consideration supported the "at-will" relationship during non-assignment periods. *See* App. p. 15 ("Kelly will pay me for my work while assigned to Kelly's customer."). Thus, because the arrangement ceased to exist, Ms. Sladek lacked the ability to "quit."

II. The EAB made a legal error that is reviewed de novo when it found that Ms. Sladek was obligated to affirmatively request a new assignment in order to satisfy Section 96.5(1)(j).

The Administrative Law Judge's (ALJ) determination that Ms. Sladek had voluntarily quit, App. p. 62, is a legal conclusion that is reviewed de novo, and EAB's characterization of the ALJ's opinion as reaching a factual conclusion reviewed under the substantial evidence standard is inaccurate. EAB claims that "[t]he agencies did not apply 96.5(1)(j) to this case to find a 'statutory' quit" and that Ms. Sladek's abrupt ending of the phone call with Kelly Services and lack of communication with Kelly for four weeks were taken "*on the facts* to indicate that Ms. Sladek quit her job with Kelly services." Appellee Brief at 44. These assertions (which are based on language in the section of the ALJ opinion titled "Reasoning and Conclusions *of Law*" no less) mischaracterize the ALJ's decision as determinations of fact.

The Agency's interpretations of provisions of law are reviewed de novo. Iowa Code § 17A.19(10)(c). EAB argues, however, that the ALJ's determination that Ms. Sladek quit is an application of law to fact reviewed under the more

deferential "wholly unjustifiable" standard of Iowa Code § 17A.19(10)(m). Appellee Brief at 43; Iowa Code § 17A.19(10)(m). That argument ignores the legal interpretation of Iowa Code § 96.5(1)(j) by the ALJ that preceded the application of the law to the facts. Because the ALJ was instead making legal determinations, the much less deferential "erroneous interpretation" standard applies. *Id.* at 17A.19(10)(c).

The ALJ clearly made a legal determination when she concluded that "[t]he purpose of the statue is to provide notice to the temporary agency employer that the claimant is available for *and seeking work* at the end of the temporary assignment." App. p. 62. The interpretation of a statute is always a question of law. *Birchansky Real Estate, L.C. v. Iowa Dep't of Pub. Health*, 737 N.W.2d 134, 138 (Iowa 2007). And the goal in interpreting a statute "is to determine the legislature's intent when it enacted the statute." *Id.* (quoting *Aposal Sys., Inc. v. Dep't of Natural Res.*, 681 N.W.2d 596, 602 (Iowa 2004)). In cases involving the Iowa Employment Security Law, the courts will construe its provisions "liberally to carry out its humane and beneficial purpose." *Bridgestone/Firestone, Inc. v. EAB*, 570 N.W.2d 85, 96 (Iowa 1997). By interpreting the purpose of the statute, the ALJ did not make a determination of fact; rather, she made a conclusion about the proper interpretation of the statue and the obligations it imposed on Ms. Sladek in

this case. This statement of statutory purpose is a legal conclusion requiring de novo review.

Despite EAB's argument that these and other conclusions in that section of the ALJ's opinion are factual determinations, Iowa courts have clearly held that the determination of whether a quit was voluntary or involuntary is a legal issue. *Peck v. EAB*, 492 N.W.2d 438, 440 (Iowa Ct. App. 1992) (citing *Sharp v. EAB*, 479 N.W.2d 280, 283 (Iowa 1991))). The courts will only defer to the legal interpretations made by an administrative agency when the Iowa Legislature "clearly delegates *discretionary* authority to an agency." *Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 11 (Iowa 2010) (quoting Arthur E. Bonfield, Amendments to Iowa Procedure, Report on Selected Provisions to Iowa State Bar Association and Iowa State Government 62 (1998)). The Iowa Supreme Court has determined that there is no delegation of authority to EAB to interpret Section 96.5. *Irving v. EAB*, 883 N.W.2d 179, 185 (Iowa 2016) ("[W]e discern no clear indication in [Section 96.5] requiring *Renda* deference and conclude that we do not defer to [EAB]'s interpretation of law."). Neither is the term "voluntary quit" "overtly complex or beyond the competency of courts," *Irving*, 883 N.W.2d at 185, such that the reviewing courts can grant deference even in the absence of an express grant of deference to the EAB. *Renda*, 784 N.W.2d at 14. There is no

restriction on the Court's ability to review EAB's interpretation of "involuntary quit" de novo. *Id.* at 11.

Section 96.5(1)(j)(1) simply does not bear the construction EAB wishes it does. Under the second sentence of Section 96.5(1)(j)(1), there is a single circumstance under which a claimant can be deemed to have "quit": when the individual failed "to notify the temporary employment firm of completion of an employment assignment within three working days . . . ." The fact that the first sentence includes the "seek reassignment" obligation does *not* mean that the second sentence must also include this requirement. The ALJ's determination of what Section 96.5(1)(j) requires is not entitled to deference. Had the Iowa Legislature wished to include the same requirement in the second sentence, it would have done so.

III. Kelly Services has failed to meet its burden of proving that Ms. Sladek made an overt act to quit her job with Kelly Services.

Kelly Services has the burden of showing that Ms. Sladek's conduct constituted an overt act sufficient to demonstrate an intent to "quit." Contrary to EAB's argument, Appellee Brief at 45, Kelly's conclusion that Ms. Sladek made an overt act of quitting by hanging up and not communicating with Kelly for four weeks fails to meet this burden. It is well-established that an Iowa employer has the burden of proving that an unemployment benefits claimant is disqualified by a voluntary quit. Iowa Code § 96.6(2) (2018) ("The employer has the burden of

proving that the claimant is disqualified for benefits pursuant to section 96.5"); *Irving*, 883 N.W.2d at 209 ("In considering the question of what amounts to a voluntary quit, we must . . . place the burden of proof showing disqualification on the employer . . . ." (citing *Bartlet v. EAB*, 494 N.W.2d 684, 686 (Iowa 1993))). As such, Ms. Sladek can only be disqualified from receiving unemployment benefits if Kelly Services *affirmatively* proves that she should be.

Kelly Services simply did not meet its burden. While the Iowa courts have not addressed this specific fact pattern, they have made clear that a person cannot constructively quit a job. *See Irving*, 883 N.W.2d at 209 ("[T]here is no doctrine of constructive voluntary quit in Iowa law. A notion of constructive voluntary quit would be completely inconsistent with the beneficial purposes of the Act and the requirement of strict construction of disqualification provisions."). In keeping with that strict construction of disqualification provisions, the Court should not permit an employer to show a voluntary quit based on conduct which, at most, indicates an employee upset with learning that she had been terminated from ACT.

The one unpublished case EAB tries to analogize to the current case is distinguishable in important ways. While the court in *Bunger* did find that the claimant had committed an overt act of quitting by failing to show up, *Bunger v. EAB*, No. 17-0560, 2017 WL 6027768, at *2 (Iowa Ct. App., Nov. 22, 2017), it is important that in that case the claimant had actually been scheduled to work and

had simply not shown up for his shifts. *Id.* at *1. Furthermore, Bunger had failed to make contact with his employer for nearly seven months. *Id.* at *2. Because of these important differences between *Bunger* and this case, the Court should find that the ALJ erred by concluding that the facts of this case sufficiently establish an intent and overt act sufficient to show a voluntary "quit."

CONCLUSION

Ms. Sladek respectfully requests that this Court reverse the EAB's decision and grant her unemployment benefits.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 2,625 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared using Microsoft Office Word 2016 in a proportionally spaced typeface, Times New Roman 14.

/s/ John S. Allen — 9/11/2018
Signature — Date

CERTIFICATE OF COST

I hereby certify that the actual cost of producing the necessary copies of the preceding Reply Brief for Appellant was $0.

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