

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

KOBI E REESE

Claimant

APPEAL NO: 17R-UI-06790-TNT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KELLY SERVICES USA LLC

Employer

OC: 04/23/17

Claimant: Appellant (1R)

Iowa Code § 96.5 (2)A – Discharge Misconduct

STATEMENT OF THE CASE:

Kobi Reese, the claimant, filed a timely appeal from an unemployment representative's decision dated May 18, 2017, reference 04, that denied unemployment insurance benefits finding that the claimant was discharged from work March 30, 2017 for conduct not in the best interest of the employer. After due notice was provided, a telephone conference hearing was scheduled for June 13, 2017. Claimant participated. The employer did not participate. An administrative law judge decision was entered on June 13, 2017. The administrative law judge decision reversed the adjudicator's decision and allowed benefits. The employer filed an appeal with the Employment Appeal Board. The Employment Appeal Board, on July 5, 2017, remanded the matter to the Appeals Bureau for an administrative law judge, after due notice to conduct a due process hearing and issue an appealable decision.

In compliance with the directive of the Employment Appeal Board, a telephone conference hearing was scheduled for 11:00 on July 20, 2017. Notices were sent to the parties last known addresses of record on July 10, 2017. Although duly notified, the claimant, Kobi Reese did not respond to the hearing notice and did not provide a telephone number in which he could be reached for the hearing. He did not participate or request a postponement as required by the hearing notice. The employer participated by Ms. Staci Payne, Senior Recruiter.

ISSUE:

Whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having considered all of the evidence in the record, finds that: Kobi Reese was employed by Kelly Services USA, LLC from August 22, 2016 until March 30, 2017 when he was discharged from employment. Mr. Reese was assigned to work as a telephone customer service representative for a Kelly Services client, the ACT Company. The assignment was for full-time work and the claimant was paid by the hour. The claimant's direct supervisor at Kelly Services was Staci Payne.

Mr. Reese was discharged from his employment with Kelly Services on March 30, 2017, after the client employer, the ACT Company, directed that Mr. Reese be removed from the assignment because he was engaging in "call avoidance", which is prohibited by the company.

Based upon information that the ACT Company had received, they believed that Mr. Reese was intentionally placing callers on hold, allowing the callers to remain on hold until such time as the caller disconnected and hung up. "Call avoidance" is prohibited by ACT policy.

To ensure that the claimant was engaging in prohibited conduct, and that the allegations were true, test calls were placed to Mr. Reese's telephone at his supervisor's request.

Two calls were placed to Mr. Reese phone, and in both instances, Mr. Reese answered the calls, placed the caller on hold, and never returned to the call as promised. Because "call avoidance" is considered a serious customer service infraction, the client instructed Kelly Services to remove Mr. Reese from the assignment immediately.

When questioned about the matter by Ms. Payne, Mr. Reese did not deny the allegation and had no response. While Ms. Payne was speaking to Mr. Reese about the matter, she saw the claimant surfing the internet and making Facebook entries in violation of specific Kelly Services rules. Ms. Payne had warned Mr. Reese about this conduct previously.

The employer considered the complaint from the client to be credible, because Ms. Payne had dealt with the person who was making the complaint for an extended period of time and found that person had been truthful in all other matters.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job related misconduct. Benefits are denied.

Iowa law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. See Iowa Code Section 96.5 (2) a. They remain disqualified until such time as they qualify for benefits by working and earning insured wages ten times their weekly benefit amount.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The disqualification shall continue until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

Iowa Admin. Code r. 871-24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden to prove claimant was discharged for work connected misconduct as defined by the Iowa Employment Insurance Law. See *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). The law limits qualifying misconduct to substantial and wrong doing or repeated careless or negligence that equals willful misconduct in culpability. See *Lee v. Employment Appeal Board*, 616 N.W.2d 661 (Iowa 2000).

In the case at hand, the claimant was discharged from his employment with Kelly Services after the company client barred the claimant from their location because what the client believed were willful acts of "call avoidance" on the part of Mr. Reese.

Before barring Mr. Reese from other employment at the client location, the client had verified that call avoidance was taking place by having another supervisor in a different department; ring through to the claimant's telephone number on two occasions. On both occasions the claimant placed the calls on hold and did not return to the calls. When confronted the claimant was given an opportunity to explain his behavior but made no statements, nor deny the allegation. The claimant was again observed violating the Kelly Services rule that prohibiting using company electronic equipment for personal use although Mr. Reese had been previously warned.

The administrative law judge finds that the employer has sustained its burden of proof in this matter by a preponderance of the evidence. The allegation of "call avoidance" came from a credible source, a longtime client of the company who had taken steps to verify the allegation against Mr. Reese before requesting his removal from the assignment at their location. The claimant was given the opportunity to deny or explain his conduct at the time, but chose not to do so. Finally, the claimant was observed violating another company rule, Kelly Services own electronic equipment policies. Although mindful that the record shows Mr. Reese has denied all allegations of misconduct, the administrative law judge concludes that a preponderance of the evidence establishes that the claimant was discharged for work connected misconduct. Accordingly, the claimant is disqualified for unemployment insurance benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

The issue of whether the claimant has been overpaid unemployment insurance benefits is the result of the June 13, 2017 administrative law judge decision is remanded to the Claims Division for an investigation and determination.

DECISION:

The representative's unemployment decision May 18, 2017, (Ref 04) is affirmed. Claimant was discharged for work related misconduct. Unemployment insurance benefits are withheld until the claimant has worked in and has been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

The administrative law judge decision dated June 13, 2017 is vacated. The issue of whether the claimant has been over-paid job insurance benefits as a result of the June 13, 2017 administrative law judge decision is remanded to the Iowa Workforce Development Claims Division for investigation and determination.

Terry P. Nice
Administrative Law Judge

Decision Dated and Mailed

tn/scn