IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ELIZABETH A SAWVELL
Claimant

KELLY SERVICES INC
Employer

APPEAL NO: 14A-UI-02048-S2T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/05/14
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Elizabeth Sawvell (claimant) appealed a representative's February 19, 2014 decision (reference 01) that concluded she was not eligible to receive unemployment insurance benefits because she was discharged from work with Kelly Services (employer) for insubordination in connection with her work. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for March 17, 2014. The claimant participated personally. The employer participated by Morgan Harris, On Site Supervisor.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The employer is a temporary employer. The claimant was hired on August 30, 2013, as a full-time maintenance housekeeping worker. The claimant received the employer's handbook. On October 22, 2013, the employer issued the claimant a written warning for having a verbal altercation with a co-worker. On November 1, 14, and 18, 2013, the employer issued the claimant written warnings for inappropriate conversations with others. The employer notified the claimant each time that further infractions could result in termination from employment.

On January 3, 2014, the claimant asked the employer for a raise. The employer did not like it that the claimant asked for a raise. The claimant told a new co-worker that the employer was hard to talk to. The new co-worker told the employer the claimant called him a sleaze ball. The employer terminated the claimant on January 6, 2014, for calling him a name.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code section 96.5-2-a provides:

> An individual shall be disqualified for benefits:
>
> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
>
> a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 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.

The employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682 (Iowa 1976). In this case the employer relied on a written statement of a former employee who did not actually hear the claimant say the words for which she was terminated. That former employee relied on the words of another employee who was new at the time the claimant was terminated. The employer had the power to present testimony from the new employee but chose not to do so. The employer did not provide first-hand testimony at the hearing and, therefore, did not provide sufficient eye witness evidence of job-related misconduct to rebut the claimant's denial of said conduct. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's February 19, 2014, decision (reference 01) is reversed. The employer has not met its proof to establish job-related misconduct. Benefits are allowed.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/css