

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARJORIE VELAQUEZ
Claimant

APPEAL NO. 09A-UI-09857-DWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KELLY SERVICES INC
Employer

**Original Claim: 05/24/09
Claimant: Appellant (2)**

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

Marjorie Velazquez (claimant) appealed a representative's June 29, 2009 decision (reference 01) that concluded she was not qualified to receive benefits, and the account of Kelly Services, Inc. (employer) would not be charged because the claimant had been discharged for disqualifying reasons. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 1, 2009. The claimant participated in the hearing with her attorney, Charles Hill. Matt Olsen, a staffing supervisor, and Kate Newberg appeared on the employer's behalf. Isaura Broste interpreted the hearing. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

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

FINDINGS OF FACT:

The claimant started working for the employer on April 2, 2007. The claimant worked as a full-time assembler at EDS. Kayla Lewis supervised the claimant. On August 26, 2008, the claimant injured her hand at work.

On March 13, 2009, the claimant received a written warning for excessive absenteeism and failing to properly notify the employer when she was unable to work as scheduled. The claimant did not agree with the warning, but she was told to sign the warning or she would be suspended. The claimant understood her job was in jeopardy if she continued to be absent from work. The warning informed the claimant that if within the next 30 days she were again absent, she could be discharged.

The claimant notified the employer she was unable to work on March 24 because she was ill. The claimant did not receive a warning for this absence. On April 21, the claimant notified the employer she was unable to work because of dependent care. The claimant stayed home with her sick son on April 21. On April 28 and 29, the claimant and her son were ill. The claimant

notified the employer about these absences. No one talked to the claimant about her April absences.

On May 19, the claimant was an hour late for work because she had to get some lab work done before she went to work. The evening of May 21, the claimant received information that her father had a heart attack in Puerto Rico. The claimant stayed up all night anxious about her father's medical condition and waiting to see if she needed to take an emergency trip to Puerto Rico. Around 2:00 a.m., the claimant contacted the employer to report she was unable to work on May 22. Before her shift, the claimant contacted her EDS supervisor and explained the situation. The claimant understood her EDS supervisor excused the May 22 absence.

On May 27, 2009, the employer suspended the claimant for her May 22 absence. The employer ultimately discharged the claimant for excessive absences.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges her for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. The law presumes excessive unexcused absenteeism is an intentional disregard of the claimant's duty to an employer and amounts to work-connected misconduct except for illness or other reasonable grounds for which the employee was absent and has properly reported to the employer. 871 IAC 24.32(7).

The claimant understood her job was in jeopardy for attendance issues after she received the March 13 written warning. Even though the claimant was absent on March 24, April 21, April 28 and April 29 because either she or her son was ill, the employer did not say anything to the claimant about these absences that she had properly notified the employer about. The employer did not say anything to the claimant about reporting to work an hour late on May 19 when she had to have some lab work done. When the claimant notified the employer and EDS management that she was unable to work on May 22 and why she would not be at work, the claimant understood EDS management authorized this absence.

The employer established justifiable business reasons for discharging the claimant. The claimant may not have been the most reliable or dependable employee after she received the March 13, 2009 warning. The claimant, however, did not intentionally disregard the employer's interests - she notified the employer when she was unable to work as scheduled.

While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act. 871 IAC 24.32(8). The current act for which the employer discharged her occurred on May 22, 2009. The evidence indicates the claimant was unable to work that day because she had not slept and was distraught about her father's heart attack. The claimant may have used poor judgment when she did not work that day, but she had just learned her father had a heart attack and she needed to make sure she could be reached with updated information about his condition. Under the facts of this case, the claimant did not commit a current act of work-connected misconduct. Therefore, as of May 24, 2009, the claimant is qualified to receive benefits.

DECISION:

The representative's June 29, 2009 decision (reference 01) is reversed. The employer discharged the claimant for business reasons that do not constitute a current act of work-connected misconduct. As of May 24, 2009, the claimant is qualified to receive benefits, provided she meets all other eligibility requirements. The employer's account may be charged for benefits paid to the claimant.

Debra L. Wise
Administrative Law Judge

Decision Dated and Mailed

dlw/kjw