

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KELLY M FUESSEL
Claimant

APPEAL NO. 09A-UI-00991-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DES STAFFING SERVICES
Employer

**OC: 01/27/08 R: 04
Claimant: Respondent (1)**

Section 96.5-2 – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer, DES Staffing, filed an appeal from a decision dated January 15, 2009, reference 02. The decision allowed benefits to the claimant, Kelly Fuessel. After due notice was issued, a hearing was held by telephone conference call on February 9, 2009. The claimant participated on her own behalf and was represented by John Doak. The employer participated by Human Resources Manager Amy MacGregor, Director of Operations Jason Mucciarone, and Regional Sales Manager Jim Morgan. Exhibit One was admitted into the record.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Kelly Fuessel was employed by DES Staffing from February 25 until November 10, 2008, as a full-time placement specialist. Her work hours were from 8:30 a.m. until 5:00 p.m.

From the very beginning, the claimant had problems with absenteeism. She received verbal warnings on August 6 and September 10, 2008, regarding her poor attendance and the fact it made her unreliable. She was the only placement specialist in the office and her absence put a burden on the other staff, which was limited, as it was a small office.

On September 22, 2008, she received a performance evaluation where her attendance was noted as a problem area and she was informed it needed to improve along with other areas of her job duties. Most of her absences were due to illness, either her own or her children's, and were properly reported and covered by a doctor's excuse.

After the evaluation of September 22, 2008, Ms. Fuessel left early on October 28, was tardy three hours due to child care problems on October 30, left early due to medical problem on November 3, and was absent November 4, 2008. All of these were properly reported in advance and the medical absences covered by a doctor's excuse. On November 5, 2008, she

was four minutes late to work because her start time was moved to 7:00 a.m. and she had trouble getting her children ready and to day care 90 minutes early.

REASONING AND CONCLUSIONS OF LAW:

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.

871 IAC 24.32(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The claimant had been advised her job was in jeopardy as a result of her absenteeism. However, there must be a current, final act of misconduct before disqualification for unemployment benefits may be imposed. 871 IAC 24.32(8). The employer does not dispute almost all of her absences were due to illness and properly reported, and covered by a doctor's excuse. Therefore, these absences were excused and do not constitute misconduct. Two of the final incidents were a leave early and an absence due to medical problems, also properly reported with permission given by the supervisor. These also do not constitute misconduct under the provisions of Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982).

The final unexcused absence was a four-minute tardy on November 5, 2008, due to the claimant being scheduled to come in 90 minutes prior to her usual start time and this causing problems with getting the children to day care. Although child care problems are not considered an excused absence, the administrative law judge cannot consider this one unexcused tardy of four minutes, under these circumstances, to rise to the level of substantial, job-related misconduct sufficient to warrant a denial of unemployment benefits.

DECISION:

The representative's decision of January 15, 2009, reference 02, is affirmed. Kelly Fuessel is qualified for benefits, provided she is otherwise eligible.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/kjw