

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

AMY C LOGAS
736 GRAND CT
DAVENPORT IA 52803

KELLY SERVICES INC
999 W BIG BEAVER RD
TROY MI 48084-4716

Appeal Number: 04A-UI-10319-RT
OC: 08-22-04 R: 04
Claimant: Respondent (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-1 – Voluntary Quitting
Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Kelly Services, Inc., filed a timely appeal from an unemployment insurance decision dated September 16, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Amy C. Logas. After due notice was issued, a telephone hearing was held on October 14, 2004 with the claimant participating. Laurie Martin, City Manager, participated in the hearing for the employer. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer from March 24, 2003 until she was separated on June 9, 2004. The employer is a temporary employment agency. At all material times hereto, the claimant was assigned to American Honda. It was a long-term temporary position for 2080 hours or a one-year commitment. Because the claimant had taken significant time off, she worked beyond the year because she had not accumulated the 2080 hours. While still so employed, on June 7, 2004, the claimant was arrested while going to work and was absent that day and did not notify the employer. The claimant was also absent on June 8 and June 9, 2004. The claimant did not call the employer on June 8, 2004. Finally, at 9:30 a.m. on June 9, 2004, the claimant called and informed the employer that she had been arrested and had been absent. The claimant was informed that she had been terminated as a voluntary quit. The employer has a rule or policy that requires that an employee must call the employer one hour before the employee's shift is to start if that employee is going to be absent and, if the employee has one no-call/no-show absence, the employer can treat that as a voluntary quit and terminate the employee. The claimant was aware of this rule. When the claimant was arrested, she asked her sister to call the employer but the sister did not. The claimant had been previously counseled about her attendance on June 26, 2003 and October 28, 2003. If the claimant had shown up for work on June 7, 2004, work would have been available for her. The claimant never expressed any concerns to the employer about her working conditions nor did she ever indicate or announce an intention to quit if any of her concerns were not addressed by the employer. Pursuant to her claim for unemployment insurance benefits filed effective August 22, 2004, the claimant has received unemployment insurance benefits in the amount of \$1,246.00 as follows: \$178.00 per week for seven weeks from benefit week ending August 28, 2004 to benefit week ending October 9, 2004. That total amount has been offset against an overpayment from 2001 leaving an amount remaining overpaid from 2001 in the amount of \$48.00.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was.
2. Whether the claimant is overpaid unemployment insurance benefits. She is.

Iowa Code Section 96.5-1 provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

871 IAC 24.25(1) provides:

Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence

that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

871 IAC 24.25(4) provides:

(4) The claimant was absent for three days without giving notice to employer in violation of company rule.

871 IAC 24.25(16) provides:

(16) The claimant is deemed to have left if such claimant becomes incarcerated.

The first issue to be resolved is the character of the separation. The employer maintains that the claimant voluntarily quit when she was absent as a no-call/no-show for three days, June 7, June 8 and June 9, 2004 because she was in jail. The claimant maintains that she was discharged when she called the employer at approximately 9:30 a.m. on June 9, 2004 after missing work that day and the employer informed the claimant that she had been terminated as a voluntary quit. The employer has a policy that requires that an employee call the employer one hour before the employee's shift is to start if that employee is going to be absent and further provides that one no-call/no-show absence can be considered a voluntary quit. The administrative law judge concludes that the claimant was absent for three straight days without notifying the employer properly. On June 7 and June 8, 2004, the claimant was absent and no one ever called the employer. On June 9, 2004, the claimant called at 9:30 in the morning but this was three and one-half hours after her shift was to begin and four and one-half hours after the deadline for a call in. The claimant was absent because she was arrested and in jail. The claimant first testified that she was only in jail on June 8 and June 9, 2004 but later conceded that she may have been in jail on June 7, 2004. The administrative law judge concludes that the claimant was in jail for three days and released on June 9, 2004 in the morning but after her work shift had started. The claimant concedes that no one called the employer while she was in jail. The claimant testified that she asked her sister to do so but the sister did not. The claimant testified that she was incarcerated because of unpaid traffic tickets. These were unrelated to the claimant's employment. The administrative law judge is constrained to conclude here that the claimant voluntarily left her employment. A claimant is deemed to have left employment if such claimant becomes incarcerated. The claimant here was incarcerated. Further, if a claimant is absent for three days without giving notice to the employer in violation of an employer rule, this is also considered a quit. Accordingly, the administrative law judge concludes that the claimant left her employment voluntarily. The issue then becomes whether the claimant left her employment without good cause attributable to the employer.

The administrative law judge concludes that the claimant has the burden to prove that she has left her employment with the employer herein with good cause attributable to the employer. See Iowa Code section 96.6-2. The administrative law judge concludes that the claimant has failed to meet her burden of proof to demonstrate by a preponderance of the evidence that she left her employment with the employer herein with good cause attributable to the employer. The only reason the claimant left her employment voluntarily was because she was incarcerated and was unable to go to work and no one called. Her incarceration was due to unpaid traffic tickets unrelated to her employment. There is no evidence that the claimant's working conditions were unsafe, unlawful, intolerable or detrimental or that she was subjected to a substantial change in her contract of hire. There is also no evidence that the claimant ever

expressed any concerns to the employer about her working conditions or indicated or announced an intention to quit if any of her concerns were not addressed by the employer. Accordingly, the administrative law judge concludes that the claimant left her employment voluntarily without good cause attributable to the employer, and, as a consequence, she is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless she requalifies for such benefits.

Even should the claimant's separation be considered a discharge, the administrative law judge would conclude that the claimant was discharged for disqualifying misconduct, namely excessive unexcused absenteeism. See 871 IAC 24.32(7). The evidence establishes that the claimant was absent for three days because she was incarcerated and failed to report these. The evidence also establishes that the claimant had other absences and had been counseled twice for her attendance. Accordingly, even should the claimant be considered to have been discharged, the administrative law judge would conclude that the claimant was discharged for disqualifying misconduct and would still be disqualified to receive unemployment insurance benefits.

Iowa Code Section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$1,246.00 since separating from the employer herein on or about June 9, 2004 and filing for such benefits effective August 22, 2004, to which she is not entitled and for which she is overpaid. The administrative law judge further concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of September 16, 2004, reference 01, is reversed. The claimant, Amy C. Logas, is not entitled to receive unemployment insurance benefits, until or unless she requalifies for such benefits, because she left employment voluntarily without good cause attributable to the employer. She has been overpaid unemployment insurance benefits in the amount of \$1,246.00. The claimant is also shown as overpaid \$48.00 in additional benefits from 2001.

tjc/b