

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ASHLEE L HAINES
Claimant

APPEAL NO. 13A-UI-03775-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

KELLY SERVICES INC
Employer

OC: 02/04/13
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed an appeal from the representative's decision dated March 22, 2013, reference 01, which held that the claimant was eligible for unemployment insurance benefits. After due notice was issued, a hearing was held by telephone conference call on May 2, 2013. The claimant participated personally. The employer participated by Julie Countryman, supervisor. The record consists of the testimony of Julie Countryman and the testimony of Ashlee Haines.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge makes the following findings of fact:

The employer is a temporary staffing agency. The claimant was hired on May 21, 2012, to work at American Honda. She worked on third shift in inventory. Her last day of work was February 26, 2013. She called in sick on February 27, 2013. She had been at the emergency room due to problems breathing. The claimant was terminated because she exceeded the number of emergency days available to her for unanticipated situations. She properly notified the employer about her absence.

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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Excessive unexcused absenteeism is one form of misconduct. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). Absence due to illness and other excusable reasons is deemed excused if the employee properly notifies the employer. See Higgins, supra, and 871 IAC 24.32(7). In order to justify disqualification, the evidence must establish that the final incident leading to the decision to discharge was a current act of misconduct. See 871 IAC 24.32(8). See also Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988). The employer has the burden of proof to show misconduct.

The claimant is eligible for unemployment insurance benefits. Although the claimant violated the employer's attendance policy, that violation does not necessarily mean that the claimant is disqualified from receiving unemployment insurance benefits. Under Iowa law, personal illness properly reported is considered an excused absence. If the claimant's final absence prior to termination is for an excused absence, this means that there is no discharge for a current act of misconduct and therefore no misconduct. Since the claimant's final absence was for personal illness properly reported, no misconduct has occurred. Benefits are allowed if the claimant is otherwise eligible.

DECISION:

The unemployment insurance decision dated March 22, 2013, reference 01, is affirmed. Unemployment insurance benefits are allowed, if the claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/tll