

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

GALEN J FREDRICKSEN
Claimant

APPEAL NO. 07A-UI-08859-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KELLY SERVICES INC
Employer

**OC: 02/04/07 R: 02
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed an appeal from a decision of a representative dated September 12, 2007, reference 08, which held the claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on October 2, 2007. The claimant participated. The employer participated by Matt Olsen, Staffing Supervisor. Exhibits One, Two and Three were received into evidence.

ISSUE:

At issue in this matter is whether the claimant was discharged from employment for misconduct in connection with his work.

FINDINGS OF FACT:

The administrative law judge having heard the testimony and considered all of the evidence in the record, finds: The claimant worked for this temporary employer from March 14, 2007 until August 9, 2007 as a data entry worker assigned to work at Noridian Mutual Insurance Company. Mr. Fredricksen was paid by the hour. The claimant's contact person at Kelly Services was Mr. Matt Olson.

On August 9, 2007, the claimant was removed from the client-employer's location at the client's request. The client believed that Mr. Fredricksen had accessed inappropriate websites after being warned not to do so the previous day. Although Noridian Mutual Insurance Company was no longer willing to utilize the claimant's temporary services, Kelly Services nonetheless continued to keep Mr. Fredricksen on its employment rolls and continued to find other perspective assignments for the claimant.

It is Mr. Fredricksen's position that he did not intentionally access any inappropriate websites. It is the claimant's position that he mistakenly accessed a website of that nature on August 8, 2007 and that the website unexpectedly "opened" again on August 9 as the claimant was performing other duties for the company.

REASONING AND CONCLUSIONS OF LAW:

The administrative law judge concludes based upon the evidence in the record that the employer has not sustained its burden of proof in establishing intentional disqualifying misconduct on the part of Mr. Fredricksen. In this case the evidence establishes that although Mr. Fredricksen was removed from the Noridian Mutual Insurance Company's assignment, the claimant was not removed from Kelly Services Employment rolls and Kelly Services continued to keep the claimant as a temporary employee attempting to assign him to other client locations. The claimant's employer, Kelly Services, therefore did not consider the claimant's conduct to be of such a nature to preclude him from continuing employment with Kelly Services. The administrative law judge also notes that Mr. Fredricksen in his sworn testimony denied intentionally accessing inappropriate websites at the client location. The only evidence on behalf of the employer that the claimant's conduct should be disqualifying was based solely on hearsay. While hearsay is admissible in administrative proceedings, it cannot be accorded the same weight as sworn direct testimony. The administrative law judge finds Mr. Fredricksen to be a credible witness and finds that his testimony is not inherently improbable.

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.

For the reasons stated herein the administrative law judge concludes that the claimant's discharge took place under nondisqualifying conditions. Benefits are allowed if the claimant is otherwise eligible.

DECISION:

The representative decision dated September 12, 2007, reference 08, is hereby affirmed. The claimant was separated under nondisqualifying conditions. Benefits are allowed, providing the claimant meets all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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