

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

THOMAS G SHERWOOD
Claimant

APPEAL NO. 12A-UI-05016-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KELLY SERVICES INC
Employer

**OC: 01/01/12
Claimant: Appellant (2)**

Section 96.5(1) – Quit
Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The claimant, Thomas Sherwood, filed an appeal from a decision dated April 24, 2012, reference 02. The decision disqualified him from receiving unemployment benefits. After due notice was issued, a hearing was held by telephone conference call on May 23, 2012. The claimant participated on his own behalf. The employer, Kelly Services, participated by Senior Supervisor Amy Becker.

ISSUE:

The issue is whether the claimant quit work with good cause attributable to the employer or was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Thomas Sherwood was employed by Kelly Services from January 18 until March 26, 2012. He was assigned to Denso International on a long-term basis. During the course of his assignment he was absent four days due to illness and was late over an hour on March 16, 2012, because he had been at an interview.

On March 22, 2012, he e-mailed Senior Supervisor Amy Becker and asked for three days off, April 13, and May 3 and 4, 2012. The last two days was because of a large family gathering at the time of his daughter's graduation. Ms. Becker forwarded the request to Denso who notified her it wanted the claimant removed from the assignment for absenteeism and "lack of dedication to the job." She informed Mr. Sherwood by phone on March 26, 2012.

REASONING AND CONCLUSIONS OF LAW:

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.

There is nothing in the record to support a finding of a voluntary quit. A voluntary quit requires an intention to quit accompanied by an overt act carrying out that intent. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980). The claimant did not voluntarily resign.

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 was discharged for absenteeism and "lack of commitment" to the assignment. He did miss four days due to illness but a properly reported illness cannot be considered misconduct as it is not volitional. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). The tardiness was not excused but that is only one incident and does not constitute excessive, unexcused absenteeism. The precipitating event appears to have been the request for days off in the future, and that is not misconduct. As there was no final, precipitating event, disqualification may not be imposed.

DECISION:

The representative's decision of April 24, 2012, reference 02, is reversed. Thomas Sherwood is qualified for benefits provided, he is otherwise eligible.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/css