

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KIRK E NIELSEN
Claimant

APPEAL NO. 06A-UI-09625-AT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KELLY SERVICES INC
Employer

OC: 09-03-06 R: 02
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Kelly Services, Inc. filed a timely appeal from an unemployment insurance decision dated September 26, 2006, reference 01, which allowed benefits to Kirk E. Nielsen. After due notice was issued, a telephone hearing was held October 16, 2006 with Mr. Nielsen participating. Staffing Supervisor Lisa Havig participated for the employer.

ISSUE:

Was the claimant discharged for misconduct in connection with his employment?

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: Kirk E. Nielsen was employed by Kelly Services, Inc. on assignment at Kraft Foods from July 21, 2006 until he was discharged July 27, 2006. It was reported to Staffing Supervisor Jennifer Columbo that Mr. Nielsen was yelling and cursing at co-workers on the assignment. Based on this complaint, Ms. Columbo removed Mr. Nielsen from the assignment. She left a telephone message for Mr. Nielsen. When he returned her call, he became upset at being removed from the assignment before anyone had asked for his side of the story. Ms. Columbo then discharged Mr. Nielsen. Ms. Columbo is no longer with the company.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in this record establishes that the claimant was discharged for misconduct in connection with his employment. It does not.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

Ms. Havig testified from communications in the company's computer system. Neither Ms. Columbo nor anyone present at the site of the assignment was called to testify. The scheduled witness, Manager Jason Saffold, was not present at the time of the hearing. The notes referred to in Ms. Havig's testimony were not specific as to the language that Mr. Nielsen used. Mr. Nielsen denied using profanity.

The issue before the administrative law judge is not the propriety of the decision to discharge Mr. Nielsen. Instead, it is whether the evidence presented in this record establishes that the reason for the discharge constitutes misconduct as that term is defined in Iowa law. The administrative law judge concludes that the employer's evidence consists primarily of conclusions with insufficient detail of specific actions and language to establish misconduct. Benefits must be allowed.

DECISION:

The unemployment insurance decision dated September 26, 2006, reference 01, is affirmed. The claimant is entitled to receive unemployment insurance benefits, provided he is otherwise eligible.

Dan Anderson
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs