

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SARAH L LANDRIGAN
Claimant

APPEAL NO. 09A-UI-06775-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KELLY SERVICES INC
Employer

**Original Claim: 03/22/09
Claimant: Respondent (2-R)**

Section 96.5(2)a – Discharge for Misconduct
Section 96.3(7) – Recovery of Overpayments

STATEMENT OF THE CASE:

Kelly Services, Inc. filed an appeal from a representative's decision dated April 27, 2009, reference 02, which held that no disqualification would be imposed regarding Sarah Landrigan's separation from employment. After due notice was issued, a hearing was held by telephone on May 28, 2009. Ms. Landrigan participated personally. The employer did not respond to the notice of hearing.

ISSUE:

At issue in this matter is whether Ms. Landrigan was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

Having heard the testimony of the witness and having reviewed all of the evidence in the record, the administrative law judge finds: Ms. Landrigan began working through Kelly Services, Inc. in March of 2008 and was assigned to work at Kraft Foods. She voluntarily quit in October but was rehired in November and returned to work for Kraft Foods. Because of her attendance during the first period of employment, she was told she would be discharged if she had additional attendance issues.

Ms. Landrigan was absent because her son was sick on January 24, 2009. However, she failed to call the employer to report the intended absence. As a result, she received a warning. The decision to discharge was based on the fact that she was an hour late on March 20. She was late because she spent a good deal of the night before having an argument with her boyfriend. She was notified of her discharge after she reported to work on March 20, 2009.

Ms. Landrigan filed a claim for job insurance benefits effective March 22, 2009. She has received a total of \$1,215.00 in benefits since filing the claim.

REASONING AND CONCLUSIONS OF LAW:

An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). An individual who was discharged because of attendance is disqualified from

benefits if she was excessively absent on an unexcused basis. In order for an absence to be excused, it must be for reasonable cause and must be properly reported. 871 IAC 24.32(7). The administrative law judge is not bound by an employer's designation of an absence as unexcused. Tardiness in reporting to work is considered a limited absence from work.

Ms. Landrigan was warned when rehired in November of 2008 that she could be discharged if she had further attendance issues. In spite of the warning, she accumulated an unreported absence on January 24, 2009. She was again warned about her attendance at that point but was again absent without notice on March 20 when she reported to work an hour late. Moreover, the tardiness of March 20 was not for any reasonable cause. The fact that she spent most of the night arguing with her boyfriend did not constitute good cause for missing time from work.

Ms. Landrigan had two unreported absences over a period of two months after she was warned about her attendance. The administrative law judge considers this excessive. Excessive unexcused absenteeism constitutes a substantial disregard of the standards an employer has the right to expect. It is, therefore, disqualifying misconduct. For the above reasons, Ms. Landrigan is not entitled to job insurance benefits.

Ms. Landrigan has received benefits since filing her claim. As a general rule, an overpayment of job insurance benefits must be repaid. Iowa Code section 96.3(7). If the overpayment results from the reversal of an award of benefits based on an individual's separation from employment, it may be waived under certain circumstances. An overpayment will not be recovered from an individual if the employer did not participate in the fact-finding interview on which the award of benefits was based, provided there was no fraud or willful misrepresentation on the part of the individual. This matter shall be remanded to Claims to determine if benefits already received will have to be repaid.

DECISION:

The representative's decision dated April 27, 2009, reference 02, is hereby reversed. Ms. Landrigan was discharged for misconduct in connection with her employment. Benefits are withheld until she has worked in and been paid wages for insured work equal to ten times her weekly job insurance benefit amount, provided she is otherwise eligible. This matter is remanded to Claims to determine the amount of any overpayment and whether Ms. Landrigan will be required to repay benefits.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/kjw