

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KRISTEN MYERS

Claimant

APPEAL NO. 13A-UI-09059-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KELLY SERVICES INC

Employer

OC: 03/03/13

Claimant: Respondent (2/R)

Iowa Code § 96.5(2)(a) - Discharge for Misconduct

Iowa Code § 96.3-7 - Overpayment

STATEMENT OF THE CASE:

Kelly Services, Inc. (employer) appealed an unemployment insurance decision dated July 30, 2013, reference 03, which held that Kristin Myers (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 11, 2013. The claimant participated in the hearing. The employer participated through Lori Smith, District Manager. Employer's Exhibits One and Two were admitted into evidence.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was employed in temporary administrative positions from September 4, 2012 through July 11, 2013 when she was discharged for a repeated failure to follow directives. She was assigned to an OB-GYN office from September 4, 2012 through February 28, 2013 when the contract employer asked that she be removed from the assignment. The claimant was then assigned to Aegon Trans America from March 11, 2013 through July 11, 2013 when the contract employer again asked that she be taken off the assignment. During her employment, she had 17 attendance occurrences which included seven absences and ten instances of arriving late or leaving early. The claimant also had ten coaching conversations either with the employer or the contract employer. Four of those coachings were about her excessive cell phone use and inappropriate instant messaging of another temporary employee.

The claimant was coached on October 26, 2012 about making personal calls and using the internet during work hours. The employer followed up with the claimant on October 31, 2012 and advised her to limit cell phone usage to breaks and lunches. The employer discussed the claimant's attendance issues with her on March 1, 2013 and counseled her on April 17, 2013

about perception in the work place. The claimant had been looking at an Avon book while the group was waiting on a trainer who was helping someone individually. The contract employer sent a group email out to the temporary employees on May 9, 2013 due to the excessive phone use and inappropriate instant messaging. The claimant continued these practices and was removed from the assignment.

The claimant filed a claim for unemployment insurance benefits effective March 3, 2013 and has received benefits after the separation from employment.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-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. 871 IAC 24.32(1).

The employer has the burden to prove the discharged employee is disqualified for benefits for misconduct. *Sallis v. Employment Appeal Bd.*, 437 N.W.2d 895, 896 (Iowa 1989). The claimant was discharged on July 11, 2013 for a repeated failure to follow directives. Repeated failure to follow an employer's instructions in the performance of duties is misconduct. *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). The claimant had received numerous verbal warnings but her behavior did not change. She denied texting but admitted she could see where it could be misconstrued that she was texting because she had to sign back in to Pandora every 15 minutes when she was listening to music at work. When a claimant intentionally disregards the standards of behavior that the employer has a right to expect of its employees, the claimant's actions are misconduct. Benefits are denied.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3-7-a, -b.

The matter of deciding the amount of the overpayment and whether the amount overpaid should be recovered from the claimant and charged to the employer under Iowa Code § 96.3-7-b is remanded to the Agency.

DECISION:

The unemployment insurance decision dated July 30, 2013, reference 03, is reversed. The claimant is not eligible to receive unemployment insurance benefits because she was discharged from work for misconduct. Benefits are withheld until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/css