

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

PHILIP E HAYES
1024TH ST APT #8
DES MOINES IA 50311

KELLY SERVICES INC
999 W BIG BEAVER RD
TROY MI 48084-4716

Appeal Number: 05A-UI-02273-A
OC: 01-09-05 R: 02
Claimant: Respondent (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a - Discharge
Section 96.3-7 – Recovery of Overpayment

STATEMENT OF THE CASE:

Kelly Services, Inc., filed a timely appeal from an unemployment insurance decision dated March 2, 2005, reference 02, which allowed benefits to Philip E. Hayes. After due notice was issued, a hearing was held in Des Moines, Iowa on April 6, 2005 with Mr. Hayes participating. Staffing Supervisor Jessica Darrow participated for the employer. Exhibit D-1, the documents and statements from the administrative file, were admitted into evidence.

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: Philip E. Hayes was employed by Kelly Services, Inc. from September 21, 2003 until he was discharged February 9, 2005. He was last working as a custodian on assignment at the Iowa State Capitol. Mr. Hayes was accused of reading classified material while at work. The state requested that he be taken off the assignment. At 2:48 p.m. on the afternoon of February 9, 2005, Barbara Klackl-McCloud called Mr. Hayes at home to advise him of this. Mr. Hayes became very argumentative and continually interrupted Ms. Klackl-McCloud during the phone call. Ms. Klackl-McCloud's supervisor, Jessica Darrow, was approximately five to six feet away as the conversation began. Although she could not tell what Mr. Hayes was saying, she could hear his voice from where she sat. Eventually Ms. Klackl-McCloud discontinued the phone call because Mr. Hayes continued to interrupt her. Mr. Hayes called at 3:08 p.m. and was discharged by Ms. Darrow because of his earlier behavior on the telephone, not because of the allegation from the state.

Mr. Hayes has received unemployment insurance benefits since filing an additional claim effective February 6, 2005.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Hayes was discharged for misconduct in connection with his employment. It does.

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).

The employer has the burden of proof. Ms. Darrow testified of her observations of the conversation between Mr. Hayes and Ms. Klackl-McCloud. Mr. Hayes acknowledged arguing with Ms. Klackl-McCloud. In the hearing, Mr. Hayes displayed the same types of behavior described by Ms. Darrow during his testimony. While it was appropriate for him to deny the allegations, it was not conduct in the interest of the employer to raise his voice and to interrupt repeatedly.

Mr. Hayes justified his behavior by referring to the First Amendment's right to freedom of speech. The First Amendment places restrictions on the actions of government. It does not limit a private employer's right to discipline or discharge an employee for inappropriate speech.

Midway through the hearing, Mr. Hayes requested that the administrative law judge recuse himself on the basis that the administrative law judge had ruled against Mr. Hayes in another case involving another employee some 14 years ago. The administrative law judge has no recollection of having met Mr. Hayes previously, but he recognizes that he may well have done so. The test for recusal is not whether the administrative law judge has dealt with a party in the past. The test is whether the administrative law judge has prior personal knowledge of the incidents related in the hearing and whether the administrative law judge had any preconceived bias against or in favor of either party. See 871 IAC 26.7(1) The administrative law judge states that he had no prior knowledge and no preconceived bias. It is the duty of the administrative law judge to question both sides in an attempt to find out as much as possible about the incidents leading directly to discharge. The fact that the administrative law judge asked Mr. Hayes some difficult questions is not an indication of bias. As he did previously on the record, the administrative law judge again declines to recuse himself from this hearing.

Mr. Hayes has received unemployment insurance benefits to which he is not entitled. They must be recovered in accordance with the provisions of Iowa Code section 96.3-7.

DECISION:

The unemployment insurance decision dated March 2, 2005, reference 02, is reversed. Benefits are withheld until the claimant has worked in and has been paid wages for insured work equal to 10 times his weekly benefit amount, provided he is otherwise eligible. He has been overpaid by \$235.00.

pjs/pjs