

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

APRIL G WOLFE
713 W PEARL ST
KNOXVILLE IA 50138

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

Appeal Number: 04A-UI-08937-DT
OC: 07/18/04 R: 02
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

Kelly Services, Inc. (employer) appealed a representative's August 16, 2004 decision (reference 01) that concluded April G. Wolfe (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 13, 2004. The claimant participated in the hearing. Kalani Brown appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE: Was there a disqualifying separation from employment?

FINDINGS OF FACT:

The employer is a temporary employment firm. The claimant had only one long-term assignment through the employer that began on June 23, 2003. Her last day on the assignment was July 1, 2004. The assignment ended because the employer's business client determined to end it because of the claimant's attendance. The employer notified her of that decision on July 9, 2004.

The claimant's normal work schedule was Tuesday, Thursday, Friday, and Saturday from 8:00 a.m. to 6:00 p.m., working as a customer service agent. Prior to July 1, the claimant had the following attendance record:

Date	Occurrence/reason if any
10/26/03	Absent, infant child ill.
11/20/03	Left early, personal illness.
02/24/04	Absent, personal illness.
03/16/04	Absent, infant child ill.
03/27/04	Left early, babysitter availability.
04/22/04	Absent, infant child ill.
04/27/04	Late, unknown time or reason, but called to notify.
04/30/04	Late, unknown time or reason, but called to notify.
06/03/04	Absent, personal illness, doctor's excuse.

The claimant had been given a counseling in November 2003 and again after the March 16 absence. On April 30, 2004 she was given a final written warning after her tardies. The warning indicated that if there were three more occurrences in 90 days, she would be discharged. She understood that to refer to tardiness.

The claimant was scheduled for vacation from July 2 through July 6, to return to work on Thursday, July 8. On her vacation, she had driven to North Carolina. She started back on July 6, intending to arrive back in Iowa on July 7 with sufficient leeway to be back at work the morning of July 8. However, the claimant's car broke down approximately three to four hours after starting back to Iowa. The car was not going to be able to repaired for a couple days due to needing a part, so she called both the employer and the business client to inform them of her situation. She called both again on July 8 to report that she was not going to be at work and that she was on her way back and should be at work on July 9. The claimant did arrive back in time to attempt to report to work on July 9; however, she was informed at that time that she was being released from the assignment due to her attendance.

REASONING AND CONCLUSIONS OF LAW:

The essential question in this case is whether there was a disqualifying separation from employment. The first sub issue in this case is whether the employer or the business client ended the claimant's assignment and effectively discharged her for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer or client was right or even had any other choice but to terminate the claimant's employment but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate decisions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988). 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 section 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982).

The focus of the definition of misconduct is on acts or omissions by a claimant that “rise to the level of being deliberate, intentional or culpable.” Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
 - a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
 - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
 - a. Manifest equal culpability, wrongful intent or evil design; or
 - b. Show an intentional and substantial disregard of:
 1. The employer's interest, or
 2. The employee's duties and obligations to the employer.

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, (7) provide:

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).

(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 reason the employer was forced to discharge the claimant from her assignment was her attendance. In order to be misconduct, absenteeism must be both excessive and unexcused. The record does not establish that the claimant's absences were both excessive and unexcused. Absences due to properly reported individual illness or that of an infant child cannot constitute work-connected misconduct since they are not volitional, even if the employer was fully within its rights to impose discipline for the absence under its attendance policy. Cosper, supra; Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). Because the final absence was related to a reasonable grounds outside the claimant's control, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct and no disqualification is imposed. The employer has failed to meet its burden to establish misconduct. Cosper, supra. The claimant is not disqualified from benefits.

DECISION:

The representative's August 16, 2004 decision (reference 01) is affirmed. The claimant did not voluntarily quit, and the employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible. The employer's account is not subject to charge in the current benefit year.

ld/tjc