

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

PENNY S BENT

Claimant

APPEAL NO. 08A-UI-04883-AT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KELLY SERVICES INC

Employer

**OC: 04/20/08 R: 02
Claimant: Respondent (2)**

Section 96.5-2-a – Discharge for Misconduct

Section 96.3-7 – Recovery of Overpayments

STATEMENT OF THE CASE:

Kelly Services, Inc., filed a timely appeal from an unemployment insurance decision dated May 16, 2008, reference 01, that allowed benefits to Penny S. Bent. After due notice was issued, a telephone hearing was held June 5, 2008, with Ms. Bent participating. Staffing Supervisor Jessica Fedders participated for the employer.

ISSUES:

Was the claimant discharged for misconduct?

Has the claimant been overpaid unemployment insurance benefits?

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: Penny S. Bent was employed by Kelly Services, Inc., on assignment as EDS from August 13, 2007, until she was discharged January 9, 2008. Ms. Bent was absent without contact on January 3, 4, and 7, 2008, because of a medical condition. On January 8, 2008, a supervisor from EDS called Kelly Services to say that Ms. Bent should be replaced on the assignment because of her absences. Staffing Supervisor Kelly Roush reached Ms. Bent by telephone on January 9, 2008.

Ms. Bent has received unemployment insurance benefits since filing a claim effective April 20, 2008.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence establishes that the claimant was discharged for misconduct in connection with her 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.

The employer has the burden of proof. See Iowa Code section 96.6-2. Excessive unexcused absenteeism is one form of misconduct. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). Absence due to a medical condition is excused if, and only if, it is properly reported to the employer. See 871 IAC 24.32(7).

The evidence establishes that Ms. Bent was absent without contact on January 3, 4, and 7, 2008. She testified that she had no telephone service on the days in questions but that she had not asked her parents, with whom she lives, to contact the employer while they were away from the house. It does seem curious to the administrative law judge that the employer was able to contact Ms. Bent by telephone on January 9, 2008. Even accepting the claimant's testimony that telephone service has recently been restored, the evidence still shows that Ms. Bent had not contacted the employer before the call from Ms. Roush. From this, the administrative law judge concludes that the claimant was discharged for excessive unexcused absenteeism. Benefits must be withheld.

Ms. Bent has received unemployment insurance benefits to which she 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 May 16, 2008, reference 01, is reversed. Benefits are withheld until the claimant has worked in and has been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. She has been overpaid by \$1,038.00.

Dan Anderson
Administrative Law Judge

Decision Dated and Mailed

kjw/pjs