

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

PATRICIA A DEWITT
Claimant

APPEAL NO. 07A-UI-00648-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

KELLY SERVICES INC
Employer

**OC: 12/10/06 R: 02
Claimant: Respondent (1)**

Section 96.5-1-j – Separation from Temporary Employer

STATEMENT OF THE CASE:

Kelly Services (employer) appealed a representative's January 12, 2007 decision (reference 01) that concluded Patricia DeWitt (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on February 5, 2007. The claimant participated personally. The employer participated by Molly Hoveland, Staffing Supervisor. The claimant offered one exhibit which was marked for identification as Exhibit A. Exhibit A was received into evidence

ISSUE:

The issue is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The employer is a temporary employment service. The claimant performed services from November 6 through November 15, 2006, where she was assigned at E.D.S. The claimant's assignment required that she submit to a pre-assignment drug test. The claimant received a copy of the employer's and E.D.S.'s drug policy.

The claimant submitted to urinalysis on November 3, 2006. She informed the personnel at the laboratory that she was taking Darvocet for abdominal pain. The claimant could not get an appointment to see her physician immediately. The claimant's grandmother gave the claimant some Darvocet for the pain. The personnel told her not to worry. The claimant went through training at E.D.S. while awaiting the results of the test.

At some point the laboratory contacted the claimant and informed her she tested positive for Darvocet. The claimant explained the situation to the Medical Review Officer. The claimant obtained a note from her physician indicating she was taking Darvocet as needed for pelvic pain. On November 24, 2006, claimant telephoned the employer about whether she could work. The employer told the claimant that she was terminated in the computer.

REASONING AND CONCLUSIONS OF LAW:

The administrative law judge finds the claimant was not discharged for misconduct.

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 in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant was taking medication for pain. The claimant's physician indicated she could take that particular medication for pain as needed. The employer did not provide any evidence of misconduct at the hearing. Consequently, the employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's January 12, 2007 decision (reference 01) is affirmed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/css