

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

MICHELE K HUERTA  
1516 EVERGREEN APT C #10  
DES MOINES IA 50320

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

Appeal Number: 05A-UI-03863-RT  
OC: 01-02-05 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, 4<sup>th</sup> 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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

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

STATEMENT OF THE CASE:

The employer, Kelly Services, Inc., filed a timely appeal from an unemployment insurance decision dated April 7, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Michele K. Huerta. After due notice was issued, a telephone hearing was held on May 2, 2005, with the claimant participating. Patty Cairns, On-Site Coordinator, participated in the hearing for the employer. Kim Bedwell sat in on the hearing for the employer but did not participate. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

#### 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: The claimant was employed by the employer since April 12, 2004. The employer is a temporary employment agency. The claimant's most recent assignment was at QSP beginning approximately February 18, 2005. This assignment was full time and the claimant was acting as an assembly worker or shipping supervisor. The claimant was discharged on March 18, 2005 for an incident involving the manager or supervisor of QSP. The claimant had made some kind of a mistake the night before and the manager came up to the claimant and confronted her about the mistake. The claimant became upset at being admonished for the mistake and told the manager that she was "high and mighty," using the "fuck" word, and telling her that she worked her "ass" off. The manager went to inform the employer's witness, Patty Cairns, On-Site Coordinator for the employer, Kelly Services, Inc. In the meantime the claimant was escorted off the premises by the assistant manager or supervisor of QSP. The claimant had never received any warnings for such behavior but the employer has a policy that specifically prohibits threatening behavior and lewd or offensive comments or gestures and provides that such behavior can result in discharge. The claimant had signed an acknowledgement of this policy and was aware of the policy. Pursuant to her claim for unemployment insurance benefits filed effective January 2, 2005, and reopened effective March 20, 2005, the claimant has received unemployment insurance benefits in the amount of \$1,092.00 since separating from the employer on March 18, 2005 and reopening her claim for benefits effective March 20, 2005 as follows: \$182.00 per week for six weeks from benefit week ending March 26, 2005 to benefit week ending April 30, 2005. The claimant received benefits prior to her employment with the employer herein but those are not relevant here.

#### REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was.
2. Whether the claimant is overpaid unemployment insurance benefits. She is.

The parties agree, and the administrative law judge concludes, that the claimant was discharged on March 18, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer's witness, Patty Cairns, On-Site Coordinator, credibly testified that the claimant was discharged when she became upset after being admonished about a mistake by the manager or supervisor of QSP, the assignee of the employer. The claimant referred to the manager or supervisor as "high and mighty" and used the word "ass" in a comment. The claimant also used the "fuck" word. The manager or supervisor did not use profanity at the claimant. Before getting upset, the claimant should have consulted Ms. Cairns, the On-Site Coordinator for the employer, Kelly Services, Inc. She did not but lashed out at the manager or supervisor of QSP. The claimant had never received any warnings for such behavior but the employer has a policy, of which the claimant was aware and for which she signed an acknowledgement, prohibiting threatening behavior and lewd or offensive comments. Violations of this policy may result in discharge. The administrative law judge concludes that the claimant did use profanity and derogatory comments to the manager or supervisor of QSP.

The claimant even concedes that she did so. The administrative law judge even concludes that the claimant used the "fuck" word but the claimant testified that she did not believe or did not recall using this. The claimant's testimony was equivocal and the administrative law judge concludes that she did, in fact, use that word as well. The claimant also conceded that the manager or supervisor of QSP did not use profanity at her. Based upon the evidence here, the administrative law judge must conclude that the claimant's use of the profanity and derogatory comments, in view of the employer's policy prohibiting such comments and the claimant's familiarity with the policy, was a deliberate act constituting a material breach of her duties and obligations arising out of her workers' contract of employment and evinced a willful or wanton disregard of the employer's interests and was disqualifying misconduct. In Myers v. Employment Appeal Board, 462 N.W.2d 734, 738 (Iowa App. 1990), the Iowa Court of Appeals held that the use of profanity or offensive language in a confrontational, disrespectful or name-calling context, may be recognized as misconduct, even in the case of isolated incidents or situations in which the target of abusive name-calling is not present. The administrative law judge concludes that there was profanity and offensive language used which was used in a confrontational and disrespectful context and the target of the language was present. Even though this may have been an isolated incident, the administrative law judge concludes that the extent of the confrontation on the part of the claimant is disqualifying misconduct. The administrative law judge notes that the claimant's description of the conduct by the manager or supervisor contained no profanity and merely said that the supervisor took the claimant's log book and was flipping through it and pointing her finger and tapping her toes and criticizing the claimant. The administrative law judge does not believe that this behavior should in any way prompt the response from the claimant that the claimant gave. The administrative law judge concludes that the claimant's response was disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct and, as a consequence, she is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless she qualifies for such benefits.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$1,092.00 since separating from the employer herein on or about March 18, 2005 and reopening her claim for benefits effective March 20, 2005. The administrative law judge further concludes that the claimant is not entitled and is overpaid such benefits. The administrative law judge finally concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of April 7, 2005, reference 01, is reversed. The claimant, Michele K. Huerta, is not entitled to receive unemployment insurance benefits, until or unless she requalifies for such benefits, because she was discharged for disqualifying misconduct. She has been overpaid unemployment insurance benefits in the amount of \$1,092.00.

pjs/pjs