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

BONNIE J SCHROEDER
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EMPLOYMENT CONNECTIONS INC
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Appeal Number: 04A-UI-05916-RT
OC: 05-09-04 R: 01
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 for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Employment Connections, Inc., filed a timely appeal from an unemployment insurance decision dated May 21, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Bonnie J. Schroeder. After due notice was issued, a telephone hearing was held on July 6, 2004, with the claimant participating. The claimant was represented by Frank Comito, Attorney at Law. Deb Tornow was available to testify for the claimant, but not called because her testimony would have been repetitive and unnecessary. Jim Kitterman, Co-Owner, and Diane Kitterman, Co-Owner, participated in the hearing for the employer, Employment Connections, Inc. Employer's Exhibit 1 was admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

The hearing was originally scheduled for June 18, 2004 at 10:00 a.m. and rescheduled at the request of the claimant's attorney. The claimant's attorney, by telephone call with the administrative law judge at 12:02 p.m. on June 29, 2004, requested a second continuance or rescheduling, but this was denied because there had already been one continuance by the attorney and the attorney might be available at another number or another attorney in this office might be available. Another attorney in the office represented the claimant at the hearing.

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 as a full-time human resources manager at the Farmland Project. The employer is a temporary employment agency, but the claimant was employed by them to act as a human resources manager at the Farmland Project, one of the firms to whom the employer assigned workers. The claimant was employed in this position from March 3, 1997 until she was discharged on May 3, 2004. The claimant was discharged for two alleged instances of dishonesty, failing to take a personal day when she did not work on April 30, 2004, and allowing another employee, Deb Tornow, to work more than eight hours in a day. On April 30, 2004, the employer's witness, Diane Kitterman, Co-Owner, attempted to call the claimant at the number where the claimant was at the Farmland Project. No one answered the phone. Ms. Kitterman then called Farmland and learned that neither the claimant nor Ms. Tornow was working that day. Ms. Kitterman had not heard that the claimant wanted the time off and Ms. Tornow had requested only four hours of personal time for that day. On May 3, 2004, the employer reviewed Ms. Tornow's time card and noted that although her hours were regularly from 7:30 a.m. to 4:30 p.m. with a one-hour lunch, she discovered that Ms. Tornow was working from 7:00 a.m. to 4:30 p.m. with a one-half hour lunch, therefore, working a nine-hour day instead of an eight-hour day. The employer's other witness, Jim Kitterman, Co-Owner, called the claimant and inquired about why Ms. Tornow was working a nine-hour day. The claimant responded that Ms. Tornow had to stay to witness a discipline because all disciplines needed to be witnessed by someone.

The plant, on April 30, 2004, was not going through production and no workers were there, but the supervisors were required to come in. The claimant had only learned for sure in the afternoon of April 29, 2004 that the Farmland Plant would not be in production the next day, April 30, 2004. The claimant had learned earlier that the plant might not be in production that day and had approved Ms. Tornow coming in early and taking only a one-half hour lunch so that she could get 40 hours for the week. The claimant explained this to the employer in a face-to-face meeting on May 3, 2004. The claimant believed that because she was salaried, she did not have to work when the plant was closed and no production was going on and explained to the employer that that is why she did not work on April 30, 2004. Because the employer believed that the claimant was only to be off of work on recognized holidays, the claimant was discharged. The claimant had never received any warnings or disciplines for this or similar behavior. There was no other reason for the claimant's discharge.

On April 27, 2004, the claimant informed Ms. Kitterman that she believed the plant might be closed on April 30, 2004 if it met its production goals during the week and the claimant was told if the plant works production, then the claimant is to work, and if not, the claimant does not work. The claimant was not told that she had to take a personal day. The claimant was also told that if Ms. Tornow wanted to be paid, she needed to take a personal day. The claimant then informed Ms. Kitterman on April 29, 2004 at 5:00 p.m., that there would be no production the next day and that neither she nor Ms. Tornow would be working and Ms. Kitterman

approved. Ms. Tornow worked extra hours for four days and then took four hours of personal time. Pursuant to her claim for unemployment insurance benefits filed effective May 9, 2004, the claimant has received unemployment insurance benefits in the amount of $2,898.00 as follows: $322.00 per week for nine weeks from benefit week ending May 22, 2004 to benefit week ending July 3, 2004. For benefit week ending May 15, 2004, the claimant received vacation pay canceling benefits for that week.

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 not.

2. Whether the claimant is overpaid unemployment insurance benefits. She is not.

The administrative law judge concludes that the claimant was discharged on May 3, 2004. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code Section 96.6(2) and Cosper v. IDJS, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. Although it is a close question, the administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer alleges two specific instances or reasons of dishonesty giving rights to the claimant's discharge. The first was the claimant's absence from work on April 30, 2004 and her failure to take a personal day. The claimant credibly testified that she believed, as a salaried employee, that she did not have to be at work when the plant was closed and there was no production. The employer's witnesses denied this and stated that the claimant could be off work only for holidays. All of the witnesses were credible but the administrative law judge concludes that the claimant's testimony was more credible. One of the employer's witnesses, Diane Kitterman, Co-Owner, testified that later the employer learned that the claimant had not worked on April 9, which was Good Friday and that that was not a holiday and the claimant was supposed to have worked that day. The administrative law judge cannot consider such evidence in regards to the claimant's discharge because it was learned by the employer after the claimant's discharge. However, the administrative law judge notes that Good Friday is often recognized as a holiday, and apparently was by Farmland, and finds that Ms. Kitterman's testimony to the contrary is not credible, that it was not a holiday and the claimant was supposed to be working.

The claimant credibly testified that she had talked to Ms. Kitterman both on April 27, 2004, indicating that the plant might possibly be closed, and later confirming that on April 29, 2004. Ms. Kitterman conceded that she had had at least a conversation on April 27, 2004, which confirms the claimant's testimony. Ms. Kitterman denies being told that the plant might be closed, but the claimant here is more credible when she testified that she told Ms. Kitterman that the plant might be closed on April 30, 2004, and the claimant's phone call to Ms. Kitterman on April 29, 2004 confirms the claimant's version because the claimant then confirmed to Ms. Kitterman that the plant was going to be closed. The claimant also credibly testified that during the conversation on April 29, 2004, she told Ms. Kitterman that both she and Ms. Tornow, another employee, would not be working on that day and this was approved. Ms. Kitterman did not deny this conversation. The administrative law judge concludes based upon the record here that the claimant legitimately believed that when the plant was closed and not going through production, that she did not have to work and did not have to take a personal

day therefore. This is consistent with what the employer's other witness, Jim Kitterman, Co-Owner, testified that the claimant told him in a face-to-face meeting on May 3, 2004. The administrative law judge also notes that the claimant was in charge of the workers at the Farmland plant. Accordingly, the administrative law judge concludes that the claimant's failure to take a personal day on April 30, 2004 was not a deliberate act constituting a material breach of her duties nor did it evince a willful or wanton disregard of the employer's interest. Since the claimant had never received any warnings or disciplines for this or similar behavior, the administrative law judge further concludes that this behavior on the claimant was not carelessness or negligence in such a degree of recurrence so as to establish disqualifying misconduct. At most, the claimant's behavior here was ordinary negligence in an isolated instance or a good faith error in judgment or discretion and is not disqualifying misconduct.

Concerning the second allegation of the improper authorization of the hours for the other worker, Deb Tornow, the claimant credibly testified that she believed that she was in charge at the Farmland plant and was never informed that she had to clear any of her decisions with Mr. and Ms. Kitterman. Mr. Kitterman testified that Ms. Tornow was not guaranteed 40 hours per week. However, it appears that Ms. Tornow's position was full time and it appears to the administrative law judge that it would be within the discretion of the claimant, at least until informed otherwise, that she could allow 40 hours for Ms. Tornow. The claimant testified that she allowed Ms. Tornow to work an extra hour for four days, from April 26 through April 29, by starting at 7:00 a.m. and taking a half hour lunch and then leaving at 4:30 p.m., as shown at Employer's Exhibit 1. The claimant testified she did so so that Ms. Tornow would have a 40-hour week. Ms. Tornow took one-half day of personal leave or four hours, so that she could get paid her 40 hours. If the claimant was really trying to cheat the employer, she would have allowed Ms. Tornow to work even more hours on the first four days so that Ms. Tornow would not have to take any part of a personal day. The claimant did not do this. The claimant did concede that she may have told Mr. Kitterman when he first inquired about this that Ms. Tornow had to stay to witness a discipline. The claimant explained that when Mr. Kitterman called to talk to her, that the plant was very busy and that she was very busy and a lot was going on and that someone was required to be present at the plant when an employee was disciplined. This was the reason she responded as she did. However, the claimant thereafter has maintained that she allowed the extra hours to Ms. Tornow to get 40 hours and credibly testified that she believed, at least, that Ms. Tornow was guaranteed 40 hours. Again, the administrative law judge notes that the claimant was in charge of the employees at the Farmland plant. The administrative law judge also notes that the claimant's testimony is supported by what actually occurred when Ms. Tornow took four hours of personal time for April 30, 2004. The claimant testified that she was told by Ms. Kitterman on April 27, 2004, that if Ms. Tornow wanted to be paid she would have to take a personal day or at least take personal time for the time that she had not actually worked. This is in fact what the claimant had Ms. Tornow do. Here again, based upon the record, the administrative law judge concludes the claimant's allowing Ms. Tornow to work additional hours is not a deliberate act constituting a material breach of her duties nor does it evince a willful or wanton disregard of an employer's interests. Again, since the claimant did not receive any warnings or disciplines for this or similar behavior, the administrative law judge further concludes that the hours she allowed to Ms. Tornow were not careless or negligence in such a degree of recurrence as to establish disqualifying misconduct. At most, the claimant's behavior was ordinary negligence in an isolated instance or a good faith error in judgment and is not disqualifying misconduct.

In summary, and for all the reasons set out above, the administrative law judge concludes that the claimant was discharged, but not for disqualifying misconduct and, as a consequence, she is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to

warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant her disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided she is otherwise eligible.

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.
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> 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 $2,898.00 since separating from the employer herein on or about May 3, 2004 and filing for such benefits effective May 9, 2004. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of May 21, 2004, reference 01, is affirmed. The claimant, Bonnie J. Schroeder, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she was discharged, but not for disqualifying misconduct. As a result of this decision the claimant is not overpaid any unemployment insurance benefits arising out of her separation from the employer herein.

dj/tjc