

**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**

**SHANNA ADKINS  
9337 KINGMAN DR  
WEST DES MOINES IA 50266**

**K'S MERCHANDISE MART INC  
C/o SHEAKLEY UNISERVICE INC  
PO BOX 1160  
COLUMBUS OH 43216-1160**

**Appeal Number: 04A-UI-04989-RT  
OC: 04/04/04 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, K's Merchandise Mart, Inc., filed a timely appeal from an unemployment insurance decision dated April 20, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Shanna Adkins. After due notice was issued, a telephone hearing was held on May 26, 2004, with the claimant not participating. The claimant did not call in a telephone number, either before the hearing or during the hearing, where she or any of her witnesses could be reached for the hearing, as instructed in the notice of appeal. Terry Brady, Assistant Store Manger, participated in the hearing for the employer. Employer's Exhibit One was admitted into evidence. 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 witness and having examined all of the evidence in the record, including Employer's Exhibit One, the administrative law judge finds: The claimant was employed by the employer as a part-time sales associate from February 23, 2004 until she was discharged on April 5, 2004. The claimant averaged 20 hours per week. The claimant was discharged for rude, discourteous, and obscene conduct towards co-workers and customers and sexual harassment. On March 31, 2004, the claimant made certain comments to a co-worker including the use of the word "queer," "take it up the ass," "bite the pillow," "fucking" badge, and "boobs." These statements or comments made by the claimant are set out in Employer's Exhibit One which are statements by co-workers and managers who overheard the claimant. The claimant had received no warnings or disciplines for this behavior. The employer has policies in its handbook, a copy of which the claimant received and for which she signed an acknowledgement, prohibiting these comments and this behavior. The claimant is presently disqualified as a result of a disqualifying separation from a prior employer on February 29, 2004 as shown at reference 04 from which the claimant has not requalified by earning ten times her weekly benefit amount of \$211.00. Workforce Development Records show no unemployment insurance payments made to the claimant.

#### 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 not because she has received no benefits.

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).

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, Terry Brady, Assistant Store Manager, credibly testified that the claimant was discharged for rude, discourteous and obscene conduct including sexual harassment arising out of statements made by the claimant to co-workers and in the presence of customers all as set out in the Findings of Fact and contained in Employer's Exhibit One. This conduct is prohibited by the employer's policies in its handbook, a copy of which the claimant received and for which she signed an acknowledgement. There is no evidence to the contrary. Accordingly, the administrative law judge concludes that the claimant's behavior were deliberate acts constituting a material breach of her duties and obligations arising out of her worker's contract of employment and evince a willful or wanton disregard of the employer's interests and are disqualifying misconduct. The administrative law judge notes that some of the language the claimant used was profane as set out in the Findings of Fact and contained in Employer's Exhibit One. In Myers v. Employment Appeal Board, 462 N.W.2d 734, 738 (Iowa App. 1990), the Iowa Court of Appeals provided 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. Here the language the claimant used was clearly profane and offensive and was disrespectful and name-calling and does not appear to have been an isolated incident and the targets were present.

Accordingly, and for all the reasons set out above, 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 requalifies 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 not received any unemployment insurance benefits since separating from the employer herein on or about April 5, 2004 and filing for such benefits effective April 4, 2004. Since the claimant has received no benefits, she is not overpaid any such benefits.

**DECISION:**

The representative's decision dated April 20, 2004, reference 01, is reversed. The claimant, Shanna Adkins, is not entitled to receive unemployment insurance benefits until or unless she requalifies for such benefits, because she was discharged for disqualifying misconduct. Since the claimant has received no unemployment insurance benefits she is not overpaid any such benefits.

kjf/b