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

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KINSETH HOTEL CORPORATION
C/O EMPLOYERS UNITY INC
PO BOX 749000
ARVADA CO 80006-9000

Appeal Number: 05A-UI-02693-LT
OC: 02-06-05 R: 04
Claimant: Appellant (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, 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)

Iowa Code §96.5(2)a – Discharge/Misconduct
Iowa Code §96.5(1) – Voluntary Leaving

STATEMENT OF THE CASE:

Claimant filed a timely appeal from the March 7, 2005, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on March 31, 2005. Claimant did participate. Employer did participate through Dave Schwartz and was represented by Tiffany McMaster of Employers Unity.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time director of sales at Holiday Inn Express in Keokuk and Comfort Inn and Suites in Fort Madison through February 10, 2005 when she quit the portion of her job at Holiday Inn Express. When Dave Schwartz hired claimant the Comfort Inn and Suites was not

yet in existence and claimant was assigned to work at the Holiday Inn Express in Keokuk. About a year and a half ago employer built a new Comfort Inn and Suites in Fort Madison, Iowa, and claimant was assigned to work 50 percent of her time at each location with each hotel property paying half of her salary and benefits.

As the Comfort Inn business grew it became apparent that it was too much for one person to handle and she spoke to Gary Kinseth, owner and director of operations, approximately one year ago. He agreed that she would be able to work only in Fort Madison with a commensurate cut in pay and benefits. Kinseth did not participate in the hearing. Holly Randall, traveling accountant who was later moved to the corporate office, also agreed that claimant could continue to work retaining the half of her job at Fort Madison. Thus, on January 31, 2005, claimant submitted a letter of resignation for her position at the Holiday Inn Express effective February 15 but did not state she intended to resign from the Comfort Inn. Her resignation had nothing to do with a January 12 conversation with Dave Schwartz about a multiple room booking.

After claimant submitted her letter of resignation, Kinseth told her that she must represent both hotels or neither hotel and asked her if she wanted to reconsider her decision. Claimant said that she did want to reconsider, would continue to perform both jobs, and could not go without working. At a meeting on February 10, employer advised her that because of her job performance she was "not a good fit" and "accepted the resignation." Employer had never given her a performance review in her five years of employment and had not advised her that her job was in jeopardy for any reason. In April 2004 employer discussed some issues with her and she corrected the concerns. She also repeatedly requested a follow-up meeting, which was never granted, nor did employer express any concerns again about those issues. Had she known prior to her meeting with Kinseth that she could not resign only a part of her job, she would not have done so and would have kept working for both locations.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant did not quit her full-time employment but was discharged for no disqualifying reason.

Iowa Code section 96.5-1 provides:

> An individual shall be disqualified for benefits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 608, 612 (Iowa 1980).

Employer led claimant to believe she could resign from the half-time position at Keokuk and still retain her employment in Fort Madison. Her resignation clearly only applied to the Holiday Inn Express in Keokuk. Even Kinseth recognized this and told her that she could not resign from one property and offered her an opportunity to rescind her resignation. Claimant accepted the offer and expressed her intention to continue working in both locations. In spite of Kinseth's offer and claimant's acceptance of the rescission, Kinseth involuntarily terminated the entire employment relationship.

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, (8) provide:

> 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).

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. Schmitz v. IDHS, 461 N.W.2d 603, 607 (Iowa App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code §17A.14 (1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. Schmitz, 461 N.W.2d at 608. Since Kinseth did not participate in the hearing and Schwartz was not present during the communications, claimant's recollection of the conversations and events is credible.

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 issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. Miller v. Employment Appeal Board, 423 N.W.2d 211 (Iowa App. 1988).

An employer may discharge an employee for any number of reasons or no reason at all, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. Inasmuch as employer had not previously warned claimant her job was in jeopardy about "job performance" or about not being a "good fit," it has not met the burden of proof to establish that claimant engaged in any misconduct. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written) and reasonable notice should be given. Inasmuch as the employer has not established a current or final act of misconduct, benefits are allowed.

DECISION:

The March 7, 2005, reference 01, decision is reversed. The claimant accepted employer's offer to rescind her resignation and was later discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

dml/tjc