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

NATASHA J BOUWERS
PO BOX 273
PRAIRIE CITY IA 50228-0273

G & K SERVICES COMPANY
C/O TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 04A-UI-10608-RT
OC: 08-29-04 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, 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, G & K Services Company, filed a timely appeal from an unemployment insurance decision dated September 17, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Natasha J. Bouwers. After due notice was issued, a telephone hearing was held on October 21, 2004, with the claimant participating. Nora Clark, Office Manager, participated in the hearing for the employer. 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 as a full-time receptionist/general office person, from April 28, 2003 until she was discharged on August 31, 2004. The claimant was discharged for three reasons. The first, occurring on August 30, 2004, was when the claimant spoke to a co-worker, Linda Hendrixson and called her a hypochondriac and said that she was, "fucking nuts." The claimant was then discharged on August 31, 2004. The employer has a rule or policy, of which the claimant was aware, prohibiting the creation of a hostile environment and prohibiting profanity. This rule or policy is in the employer's policy and procedure book a copy of which the claimant received and which was reviewed with the employees including the claimant three to four weeks prior to the claimant's discharge.

The claimant was also discharged for attendance. On July 20, 2004, the claimant was tardy to work 15 minutes and had no explanation and did not call in her tardy. The employer has a rule or policy, of which the claimant was aware, that an employee who is going to be absent or late must call the supervisor one-half hour before the employee's shift is to start. The claimant did not do so on July 20, 2004. The claimant was late returning from lunch on July 29, 2004, 15 minutes and did not know why other than she explained to the employer she was running errands. On August 3, 2004, the claimant was tardy 45 minutes and did not know why and although she called in, she called in late. For her lunch that day, the claimant was 15 minutes late in returning from lunch. The claimant stated she did so because she was running errands for the employer. On August 12, 2004, the claimant was one hour late because she was locked out of her apartment and although she called the employer, she called late. On August 16, 2004, the claimant left her employment early because she was ill and she had permission to do so. The claimant then received a written warning and a three-day suspension for her attendance on August 17, 2004. Three days later, the claimant was tardy eight minutes and did not remember why and did not call the employer.

The claimant was also discharged for improper, personal use of the employer's computer. The employer has a policy, of which the claimant was aware, prohibiting use of the employer's computers beyond its intended purpose which is for business. The claimant wrote email love letters and other personal matters using the employer's computer. The employer discovered this when the claimant was on suspension and gave the claimant a verbal warning when she returned from her suspension on or about August 23, 2004. The claimant testified that she used the employer's computer during lunch or breaks, but the employer's policy prohibits all use of the employer's computers beyond its intended purposes which is for work.

Pursuant to her claim for unemployment insurance benefits filed effective August 29, 2004, the claimant has received unemployment insurance benefits in the amount of $700.00 for six weeks from benefit week ending September 4, 2004 to benefit week ending October 9, 2004. For four of those weeks, the claimant had earnings which either cancelled or reduced her unemployment insurance benefits.

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.

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 parties testified, and the administrative law judge concludes, that the claimant was discharged on August 31, 2004. 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, Nora Clark, Office Manager, credibly testified that on August 30, 2004, the claimant told a co-worker that she was a hypochondriac and was, "fucking nuts." The claimant concedes that she called the co-worker a hypochondriac and "nuts" but denies using the word, "fucking." However, the claimant's denial is not credible because the claimant admitted to the employer's witness, Nora Clark, Office Manager, when first confronted, that she had used the profane word although she later denied it. The employer has a policy, that prohibits establishing a hostile environment and profanity and the claimant was aware of this policy. In Myers v. Employment Appeal Board, 462 N.W.2d 734, 738 (Iowa App. 1990), the Iowa Code 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. The administrative law judge concludes that the claimant's use of the language here was disrespectful and name calling and even if an isolated incident, the target was present. Even assuming that the claimant did not use the profane word, the words that claimant concedes now that she used, hypochondriac and "nuts" is still disrespectful and name-calling. Accordingly, the administrative law judge concludes that the claimant's use of this language is a deliberate act or omission constituting a material breach of her duties and obligations arising out of her worker's contract of employment and evinces a willful or wanton disregard of the employer's interests and at the very least is carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. The claimant's explanation that she was joking is not credible because of the words themselves and because the co-worker did not believe so. The administrative law judge does not believe that the words used can be used in a joking fashion.

The claimant was also discharged for attendance. The claimant's recent attendance record is set out in the findings of fact. The claimant had four tardies in the last month of her employment, one of which occurred after a written warning and three day suspension. The claimant had no explanation for these tardies other than on one occasion when she was locked out of her apartment. The claimant did not properly call in any of these tardies. Some she did not call in at all and some were late. The administrative law judge is not convinced that the claimant being locked out of her apartment is a reason for her to be one hour late. Surely, the claimant could have come to work or went to work briefly to explain the situation or could have called the employer in a timely fashion. The claimant didn't do so. The claimant was also late coming back from lunch on two occasions as set out in the Findings of Fact. The claimant testified that she was running business errands. The claimant's testimony is not credible because for her other tardies she couldn't remember why she was tardy other than potential traffic problems, but here she could specifically remember at least on one occasion that she was running business errands. In any event, even assuming that these two tardies were for reasonable cause, the administrative law judge is constrained to conclude that the claimant's other tardies were not for reasonable cause and were not properly reported and are excessive unexcused absenteeism and disqualifying misconduct.

Finally, the claimant was discharged for personal use of the employer's computer. The claimant concedes that she used the employer's computer for personal use writing email love letters and other personal emails. The claimant testified that she did so during her lunch or break. The employer's policy, of which the claimant was aware, states that use of the employer's computer for uses beyond its intended purpose are prohibited. The intended purposes are for work. The claimant received a verbal warning for this on August 23, 2004. The administrative law judge concludes that the claimant's personal use of the computer was also disqualifying misconduct.

It is true that the claimant was not immediately discharged for her attendance or her personal use of the computer, but the administrative law judge concludes that the "Last Straw Doctrine" enunciated in Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa App. 1983) applies here. That doctrine provides that past acts and warnings can be used to determine the magnitude of a current act of misconduct and a relatively minor infraction when viewed in the light of prior infractions may evidence sufficient disregard for the employer's interest to constitute misconduct. The fact that the prior acts were remote in time from the ones for which the employee was discharged, or different in nature, does not preclude a finding of misconduct. The administrative law judge does not believe that the claimant's last act of misconduct on

August 30, 2004 was a relatively minor infraction but even so, the claimant's other infractions as set out above which were not remote in time, demonstrate sufficient disregard of the employer's interest to establish disqualifying misconduct.

In summary, 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 received unemployment insurance benefits in the amount of $700.00 since separating from the employer herein on or about August 31, 2004 and filing for such benefits effective August 29, 2004, to which she is not entitled and for which she is overpaid. The administrative law judge further concludes that these benefits must be recovered in accordance with the provisions Iowa law.

DECISION:

The representative's decision dated September 17, 2004, reference 01, is reversed. The claimant, Natasha J. Bouwers, 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 $700.00.

kjf/tjc