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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Appeal Number: 05A-UI-05052-RT
OC: 04/17/05 R: 03
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, Comprehensive Systems, Inc, filed a timely appeal from an unemployment insurance decision dated May 4, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Tessa D. Barnes. After due notice was issued, a telephone hearing was held on June 16, 2005, with the claimant participating. The claimant was represented by Steven Norby, Attorney at Law. Sheryl Pringle, Director of Personnel, and Mandy Clubb, HCBS Manager, 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.

The claimant's attorney requested by fax on June 10, 2005, at 2:57 p.m. that a subpoena be issued for the testimony of Trisha Hobbybrunken. The administrative law judge denied the request for a subpoena because it was not timely; not being received within five business or working days from the date of the hearing. The subpoena could not have gone out any sooner than Monday, June 13, 2005, which might not have been enough time to even reach the witness. The administrative law judge informed the parties that he would conduct the hearing and, if necessary, could keep the record open for the testimony of that witness or the attorney could make an Offer of Proof. The administrative law judge conducted the hearing and determined that the testimony of that witness was not necessary. The claimant's attorney made an Offer of Proof for the testimony of Ms. Hobbybrunken. The hearing was initially scheduled in this matter for June 1, 2005, at 11:00 a.m. and rescheduled at the request of the claimant's attorney, who had a conflict.

FINDINGS OF FACT:

Having heard the testimony of the witnesses, 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 direct support staff person from February 20, 2004, until she was discharged on April 15, 2005. The claimant averaged between 16 and 20 hours per week. The claimant was discharged for alleged inappropriate conduct with consumers or clients of the employer. The employer provides services, including assistance in the functioning of their daily lives to clients or consumers who are disabled. The employer alleged that the claimant demonstrated inappropriate conduct with consumers or clients on a number of occasions. In February of 2005, the employer alleged that the claimant remarked that, if Client A was moved to Kaplan, one of the residences of the employer, that the claimant would no longer work there. The claimant was primarily assigned to Saratoga, another residence, but occasionally worked at Kaplan. The claimant did not make this statement but rather commented about Client A being aggressive with females. Client A was aggressive with some females and some females were not permitted to work with Client A.

The employer's witnesses allege that the claimant took Client B shopping and purchased various crafts for Client B costing $150.00 and clothing and general hair accessories costing $160.00. The claimant conceded that she paid those amounts for the items. Part of the claimant's duties is to take clients shopping for personal needs. The claimant has some discretion in what she purchases. Crafts were one of the items that the claimant could assist Client B in purchasing, along with hair care and other items. The employer alleged that the claimant had spent an unreasonable amount of money. In due course, other coworkers, including supervisors, observed these purchases but said nothing to the claimant about them. These purchases occurred in March of 2005.

The employer's witnesses also allege that in March of 2005, the claimant spent $99.00 on a ring for Client C. The parents of Client C had requested that a ring be purchased for Client C costing approximately $50.00, but the claimant was not aware of the maximum dollar figure. The claimant was instructed to take Client C to get a new ring and did so. The claimant was never informed that there was a problem with the ring or the amount of money spent for the ring. This purchase occurred in March of 2005.

In March of 2005, the employer's witnesses allege the claimant wrote inappropriate notes in a communication book available for staff to write notes about work and what was necessary for certain clients or customers. The employers allege that the claimant was rude because she did not use the words "please" or "thank you." The staff routinely wrote comments or statements in

the communication book with instructions for other staff members of coworkers. They were short and brusque. The staff began to engage in "dueling" notes in the book because some staff members were displeased that other staff members were writing specific instructions to them when they had no authority to do so. There was no profanity in the notes. The claimant was one of the staff members who wrote a note in the book asking that the rudeness stop. The claimant also sent a text message to a coworker telling the coworker to quit writing rude notes in the book. The claimant did not use profanity in the text message.

In February of 2005, the employer's witnesses allege, the claimant asked a coworker if the clients knew they were retarded. Then the employer alleged that the claimant asked Client D if he was retarded and Client D denied it. The claimant did not ask Client D any such question.

Finally, on April 13, 2005, the employer received a letter from a parent of Client E complaining about the claimant and alleging that the claimant was demanding, bossy, controlling, and argumentative. The employer's witness, Sheryl Pringle, Director of Personnel, then learned, for the first time, all of the allegations above set out and discharged the claimant on April 15, 2005. The claimant had received no warnings or disciplines for any such behavior. Pursuant to her claim for unemployment insurance benefits filed effective April 17, 2005, the claimant has received unemployment insurance benefits in the amount of $1,7555.00 as follows: $195.00 per week for nine weeks from benefit week ending April 23, 2005, to benefit week ending June 18, 2005.

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.

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).

871 IAC 24.32(8) provides:

> (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.

About the only thing that parties agree on is that the claimant was discharged on April 15, 2005. Accordingly, the administrative law judge concludes that the claimant was discharged on April 15, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for a current act of disqualifying misconduct. It is well established that the employer has the burden to prove current acts of disqualifying misconduct. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. 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 current acts of disqualifying misconduct.

The employer's witnesses testified solely from hearsay. Frequently, the declarants of the hearsay statements were not even identified. All of the claimant's acts, as alleged by the employer that gave rise to her discharge, occurred in February and March of 2005, except for the letter of complaint from the parent of Client E. There is no evidence as to when the claimant committed the acts or demonstrated the characteristics that were the subject of the complaint letter from the parents of Client E. The employer's witness, Sheryl Pringle, Director of Personnel, testified that she only learned about the acts on April 14, 2005. This may be true, but all of the acts attributed to the claimant, giving rise to her discharge, were allegedly observed by coworkers, parents or supervisors. They had a duty to report these acts immediately to those in a position of authority for the employer. They did not do so.

Ms. Pringle testified that many of the coworkers were intimidated by the claimant and did not report these acts. There is not a preponderance of the evidence that those coworkers were in fact intimidated or that that the coworkers had reason to be intimidated and, even if so, the administrative law judge does not believe that is a reason to fail to report the allegations against the claimant. Many of these allegations are extremely serious and it is incumbent upon any employee, especially a supervisor, to immediately report these acts. They did not do so. As a result, the claimant never received any warnings or disciplines for any of these acts but was just discharged when they all allegedly came to light on April 14, 2005. The administrative law

judge has no choice but to conclude that all of these acts were past conduct. A discharge for misconduct cannot be based on past acts. It is true that past acts and warnings can be used to determine the magnitude of a current act of misconduct, but there is no evidence of any warnings to the claimant and, further, there is no evidence of any current acts of misconduct. If the claimant committed all of the acts as alleged by the employer, those were serious and significant acts and surely would have come to the attention of management immediately. The fact that they did not indicates either that the acts were not as serious as alleged or that there was a serious failure in management. In either case, it is not justification to disqualify the claimant from unemployment insurance benefits for acts that occurred in the past.

Even assuming that the acts were all current, on the record here, the administrative law judge concludes that there is not a preponderance of the evidence that the claimant actually committed the acts as alleged by the employer. The employer's witnesses testified solely from hearsay. The claimant's direct testimony denied some of the allegations and explained others. The employer could not, or would not, divulge the names of some of the declarants of the hearsay statements. On the record here, the administrative law judge is constrained to conclude that the claimant's testimony is more credible than that of the hearsay testimony of the employer's witnesses. Accordingly, the administrative law judge concludes that there is not a preponderance of the evidence of any deliberate acts or omissions on the part of the claimant constituting a material breach of her duties and obligations arising out of her worker's contract of employment or evince a willful or wanton disregard of the employer's interests so as to establish disqualifying misconduct for those reasons. Concerning Client A, the claimant denied the statement attributed to her, but conceded that she had made a statement about Client A being aggressive with females. Although the employer's witnesses were reluctant, they conceded that Client A was aggressive with some females and some females were prohibited from working with Client A. This confirms the claimant's testimony. Concerning Client B, even the employer's witnesses conceded that the claimant had some discretion in what she would allow Client B to buy. Ms. Pringle testified that the parents of Client B prohibited all crafts, but the employer's other witness, Mandy Clubb, HCBS Manager, testified that the parents did permit crafts. There is no evidence that the claimant purchased items for Client B that were prohibited by the employer or the parents of Client B. The issue then becomes whether she spent too much money. The administrative law judge believes that the claimant did spend a significant amount, but the administrative law judge cannot determine on the record here that it was so unreasonable as to be deliberate or willful misconduct. At most, it was negligence. Concerning Client C, the claimant was instructed to buy a ring and did so at a cost of $90.00 to $99.00 when she was supposed to spend approximately $50.00. The administrative law judge notes the term "approximately." Again, there appears to be some discretion. The claimant denied knowing any maximum amount for the ring. She testified that the she was told to get a nice ring and did so. Again, the administrative law judge must conclude on the record here that there is no evidence of willful or deliberate misconduct but, at most, negligence. Concerning the writing in the book, apparently many of the staff were writing rude notes in the book and engaging in "dueling" comments in the book. On the record here, the administrative law judge must again conclude that there is no evidence of willful or deliberate misconduct. The claimant denied sending a text message with profanity, and the administrative law judge must conclude that there is not a preponderance of the evidence that she did so. Concerning Client D, the claimant credibly denied that she ever asked Client D if Client D was retarded. Here, there is not a preponderance of the evidence that the claimant was even negligent on this occasion, let alone willful or deliberate. Finally, the claimant was the subject of a complaint letter from a parent of Client E, indicating that she was demanding, bossy, controlling and argumentative. Without more, the administrative law judge, again, must conclude that this was not willful or deliberate conduct. At most, again, it is negligence.

As set out above, the administrative law judge concludes that, at most, the claimant's behavior was negligence. The issue then becomes whether the claimant's behavior was carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. This is a closer question. However, on the record, the administrative law judge must conclude that the claimant's acts were all isolated instances of negligence. The administrative law judge specifically notes that the claimant never received any warnings or disciplines for any of these behaviors. If the claimant had received any kind of warning or disciplines and failed to correct her behavior, then certainly recurring negligence or carelessness would be established. However, there are no such warnings or disciplines. Accordingly, the administrative law judge concludes that the claimant's behaviors were not carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct.

In summary, and for all the reasons set out above, the administrative law judge is constrained to conclude that there is not a preponderance of the evidence that the claimant's acts and behavior giving rise to her discharge were disqualifying misconduct. Therefore, 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. The administrative law judge wants to make it quite clear that he does not condone any of the behaviors alleged by the employer to have been committed by the claimant. If the employer had demonstrated by a preponderance of the evidence that the claimant had committed the acts as alleged by the employer, it would be disqualifying misconduct. However, the employer did not do so. 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, including the evidence thereof. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge is constrained to conclude here that there is insufficient evidence 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.
>
> 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 $1,755.00 since separating from the employer herein on or about April 15, 2005, and filing for such benefits effective April 17, 2005. 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 4, 2005, reference 01, is affirmed. The claimant, Tessa D. Barnes, 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 her separation from the employer herein.

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