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

BENITA K BATES
1324 E 10TH ST
DAVENPORT IA 52803

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

Appeal Number: 05A-UI-03166-RT
OC: 02-20-05 R: 04
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, Kinseth Hotel Corporation, filed a timely appeal from an unemployment insurance decision dated March 16, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Benita K. Bates. After due notice was issued, a telephone hearing was held on April 12, 2005, with the claimant participating. Jeremy Holke, General Manager; Almeda Hardy, Executive Housekeeper; Jenny Endresak, Guest Service Manager; and Michael Heesch, Banquet Captain, participated in the hearing for the employer. The employer was represented by Michele Igney of Employer's Unity, Inc. The administrative law judge takes official notice of Iowa Workforce Development 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 public areas and housekeeper from 2002 until she was discharged on February 10, 2005. The claimant was discharged for job performance and alleged insubordination in violation of employer's rules by refusing to perform her duties. The charges emanate from an incident on February 8, 2005. On that day, the claimant was told by her supervisor, Almeda Hardy, Executive Housekeeper and one of the employer's witnesses, to take linens from the washer and put them in the dryer and then fold them up when they were dry. The claimant did so. Ms. Hardy also indicated to the claimant that there may be more linens to be washed and dried. However, the claimant had never been trained or fully trained in the operation of the washing machine. For a banquet that evening, Michael Heesch, Banquet Captain and one of the employer's witnesses, called the claimant and asked the claimant if she would do some laundry for the linens needed at the banquet. The claimant indicated to him that she would need to call her supervisor. She did so. Ms. Hardy told the claimant to take the linen out of the washer and put them in the dryer. She also told Ms. Hardy that the maintenance man would be coming down to run the washing machine. However, the maintenance man never did, so the claimant did only what was instructed; in removing the linen from the washer and placing it in the dryer and then folding it. The employer has separate laundry persons and laundry was not a job function ordinarily performed by the claimant and she did not know how to use the machines although she had been shown to some extent.

The claimant believed that Mr. Heesch had called someone and told that person that the claimant was refusing to do her job. The claimant got upset at this and radioed Mr. Heesch and called him a "liar." She was loud but did not use any profanity. Many employees carry radios and could overhear this conversation and some did. In general, the claimant was appropriate over the radio and maintained proper radio etiquette unless she was upset. The claimant had received a verbal warning at some point for radio etiquette and her job performance. Pursuant to her claim for unemployment insurance benefits filed effective February 20, 2005, the claimant has received unemployment insurance benefits in the amount of $747.00 for six weeks from benefit week ending February 26, 2005 to benefit week ending April 2, 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).

The parties agree, and the administrative law judge concludes, that the claimant was discharged on February 10, 2005. 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. Iowa Department of Job Service, 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. Initially, the claimant was charged with using profanity and disrespectful language on the radio. However, none of the employer's witnesses that actually overheard the radio transmission testified that the claimant used profanity. They all agreed that the claimant used the word "liar" and that she was loud. Even the claimant concedes this. The claimant was upset because she believed that she had been accused of failing to do her job or refusing to do her job. The employer's witnesses, Michael Heesch, Banquet Captain and Jenny Endresak, Guest Services Manager, both testified that they heard the claimant on the radio on other occasions and the claimant's etiquette was proper and that she was nice unless when she may have been upset. The administrative law judge concludes under the evidence here that the claimant's use of the radio on February 8, 2005 was unusual and isolated. It is true that the claimant had received a verbal warning sometime in the past for radio etiquette but on the evidence here, and in view of the evidence that the claimant properly used the radio on other occasions, and that the claimant used no profanity on the occasion in question on February 8, 2005, the administrative law judge is constrained to conclude that although improper, her use of the radio on February 28, 2005 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 interests nor was it carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. Rather, the administrative law judge concludes that the claimant's use of the radio

on February 28, 2005 was an isolated instance of negligence or unsatisfactory conduct and is not disqualifying misconduct.

Another issue raised was whether the claimant refused to do a job that was normally hers. There was some evidence that the claimant was asked to do washing of linen but the claimant denies this, testifying instead that she was merely asked to take the linen from the washing machine and place it in the dryer and then fold it when it was dry. The claimant did this. The claimant's testimony is for the most part confirmed by the employer's witness, Almeda Hardy, Executive Housekeeper, who testified that she told the claimant to put the linens in the dryer and then fold them. Ms. Hardy did testify that she told the claimant that there may be more linens. It is not clear whether the claimant was specifically told that she would have to wash them. Ms. Hardy testified that the claimant was aware of how to use the washer and it was simple. However, the claimant testified that she had never been properly trained in the use of the washer and did not know how to do it and that it was really not one of her job descriptions. The administrative law judge must conclude on the evidence here that there is not a preponderance of the evidence that the claimant's usual duties include the laundry. The evidence establishes that the employer had two laundry persons but neither one was working on the night in question. The claimant also testified that she was told that a maintenance man was going to come down and run the washer but he never showed up. This indicates to the administrative law judge that perhaps the claimant was not routinely or as a regular part of her duties expected to do washing. Under the evidence here, the administrative law judge is constrained to conclude that there is not a preponderance of the evidence that the claimant's job duties included the washing or that she was specifically instructed to do the washing or that she specifically refused to do so. The claimant testified that it was not part of her job duties, that she was never told specifically to do the washing and that she did do what she was told to do, namely, take the laundry out of the washer and put it in the dryer and then fold it. Therefore, the administrative law judge concludes that there is not a preponderance of the evidence that the claimant's performance on February 8, 2005 was a deliberate act or omission constituting a material breach of her duties or evinced a willful or wanton disregard of the employer's interests or was carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. At the most, the claimant's behavior was mere inefficiency, or unsatisfactory conduct, or failure in good performance and again is not disqualifying misconduct.

In summary, although it is a close question, 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 including the evidence therefore. 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.
>
> 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 $747.00 since separating from the employer herein on or about February 10, 2005 and filing for such benefits effective February 20, 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 dated March 16, 2005, reference 01, is affirmed. The claimant, Benita K. Bates, 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.

sc/pjs