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

MICHAEL D LINDEMOEN
4724 EP TRUE PKWY APT 204
WEST DES MOINES IA 50265

DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT
ATTN BUSINESS/FINANCE
1801 – 16TH ST
DES MOINES IA 50314-1902

Appeal Number: 04A-UI-09638-RT
OC: 08-08-04 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, Des Moines Independent Community School District, filed a timely appeal from an unemployment insurance decision dated August 25, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Michael D. Lindemoen. After due notice was issued, a telephone hearing was held on September 30, 2004, with the claimant participating. The claimant was represented by a union representative, Robert Smith, until 11:26 a.m., as discussed below. Doug Willyard, Deputy Director of Human Resources, participated in the hearing for the employer. The administrative law judge takes official notice of Iowa Workforce Development unemployment insurance records for the claimant.

The claimant had obtained a representative, Robert Smith, from his Union Local 2048. When the administrative law judge called Mr. Smith, he learned that Mr. Smith was a bus driver and was sitting in a bus waiting for it to be loaded with children. Mr. Smith was using a cell phone. When the administrative law judge had everyone on the line, he expressed his grave concern about Mr. Smith participating by cell phone once he was operating a school bus full of children. The administrative law judge instructed Mr. Smith that when he began to operate the school bus, which was at that time sitting stationary being loaded with children, that he was to inform the administrative law judge and the administrative law judge would ask him to hang up so he could concentrate fully on his driving responsibilities. The administrative law judge, in no way, wanted to deny the claimant his choice of representation, but the administrative law judge was more concerned about the safety and well being of students riding a school bus. No one ever contacted the administrative law judge prior to the hearing to request a continuance or a rescheduling so that Mr. Smith could participate in the hearing without having to operate a school bus full of school children. The administrative law judge was totally unaware of Mr. Smith's work or his operation of a school bus until called at 11:01 a.m. for the hearing. Mr. Smith participated in the hearing and testified at the hearing. At 11:26 a.m. he began driving the school bus and disconnected.

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, most recently as a full-time chief engineer in the operations department of Merrill Middle School, from June 3, 1991 until he was discharged on July 29, 2004. The claimant was discharged after an investigation of his behavior resulted in a determination of found harassment against female workers. Beginning in March 2004 the employer began to receive complaints from female kitchen workers at Merrill Middle School that the claimant was harassing them, including using mocking behavior and "flipping off" the employees, meaning raising the middle finger in an obscene gesture, being sarcastic and belittling in tone, and using profanity, including "fucking bitches." The employer began an investigation conducted by Amanda Easton, Human Resources District Investigator. She interviewed nine witnesses, who all cited various instances of inappropriate behavior on the part of the claimant. Ms. Easton completed her investigation on June 25, 2004 and found harassment by the claimant. The employer then wanted to meet with the claimant and review a last-chance agreement discussed below. After that, the claimant was discharged on July 29, 2004. The claimant committed the offenses charged.

In April 2000 the claimant engaged in a fight with a coworker. Apparently, the coworker was the ex-husband of the claimant's girlfriend. The claimant was initially discharged, but then suspended from April to July 2000, and reinstated under a last-chance agreement, providing for his re-employment and providing further that any reoccurrence of any infraction of employee-related conduct rules would result in his discharge. The agreement said that at the end of three years the claimant could request removal. The claimant never requested removal of such last-chance agreement until the investigation into his behaviors in 2004 as noted above began. The claimant received no other warnings or disciplines.

The employer has a clear sexual harassment policy providing for a zero tolerance. This is in its handbook, a copy of which the claimant received. The employer treats a violation as meriting at least a suspension and perhaps a discharge. In the claimant's situation, because of the last-chance agreement and the founded complaint of harassment in 2004, the claimant was discharged. Pursuant to his claim for unemployment insurance benefits filed effective August 8,

2004, the claimant has received no unemployment insurance benefits. Records indicate that the claimant has made no weekly claims and has received no payments.

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. He is not because he has received no unemployment insurance 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).

The parties testified, and the administrative law judge concludes, that the claimant was discharged on July 29, 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, Doug Willyard, Deputy Director of Human Resources, credibly testified that after receiving several complaints from kitchen coworkers of the claimant at Merrill Middle School, the employer conducted an investigation and determined that the claimant had harassed employees and was discharged. The claimant was mocking and belittling to the kitchen workers and "flipped off" the coworkers by using an obscene gesture, raising the middle finger of his hand. The claimant was sarcastic and at one time referred to his coworkers as "fucking bitches." The claimant denies most of this, but his testimony is not credible. Concerning the obscene gesture, the claimant said he did not make an obscene gesture but he may have been scratching his head with his middle finger and he also pointed with his middle finger. This is not credible. In the absence of a deliberate obscene gesture, the administrative law judge has never seen anyone point with a middle finger. The claimant seems to admit the behavior but tries to excuse it as scratching his head or pointing. The administrative law judge does not buy that. Further, when the claimant was confronted by the employer's witness, Doug Willyard, Deputy Director of Human Resources, about these very serious allegations and the claimant had an opportunity to respond in a very serious setting, the claimant told Mr. Willyard that he was "screwing" one of the employees who had complained about him. If the claimant was going to use this language in a very serious meeting with his job at stake, the administrative law judge believes that he could very well make obscene gestures and make the statements and treat employees as he was alleged to have done. The administrative law judge also notes that the employer conducted an extensive investigation, interviewing nine witnesses, who all stated incidents of inappropriate behavior on the part of the claimant. The claimant now claims that the investigation was one-sided and that not all persons were interviewed. The administrative law judge does not believe that investigation must interview every potential possible witness to be a fair and complete investigation. The administrative law judge concludes that the investigation here was fair and complete and found harassment on the part of the claimant.

Approximately four years previously, the claimant had been placed on a last-chance agreement, providing that any further infraction of an employee conduct rule would result in his termination. The claimant was on notice that he needed to conduct himself appropriately. The claimant now argues that the last-chance agreement was to expire in three years. The last-chance agreement did not expire in three years. The last-chance agreement provided that the claimant could request removal at the end of three years, but the claimant made no such request until the investigation giving rise to his discharge began. At that time, the employer refused to remove the last-chance agreement. There does not appear to be any promise by the employer that the last-chance agreement would expire in three years. The claimant's testimony that he thought it had already been removed at the end of three years is not credible in view of the last-chance agreement and its written provisions. The employer has a clear policy for zero tolerance for harassment. It is in its handbook and the claimant received a copy. The employer also believes that such a violation merits at least a suspension and perhaps a discharge. Here, the claimant was discharged because of the violation and because of the last-chance agreement. Whether the claimant should have been discharged is not really an issue here. The administrative law judge must determine whether the claimant's behavior was disqualifying misconduct. The administrative law judge so concludes. The administrative law judge concludes that because of the claimant's behavior, as determined by the investigation, and in view of the last-chance agreement, whether or not it had been removed, are deliberate acts or omissions constituting a material breach of his duties and obligations arising out of his worker's contract of employment and evince a willful or wanton disregard of the employer's interest and at the very least, are carelessness or negligence in such a degree of recurrence all as to establish disqualifying misconduct. What occurred here was far more than mere inefficiency or

unsatisfactory conduct or ordinary negligence in an isolated instance or a good-faith error in judgment or discretion.

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, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he 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 no unemployment insurance benefits since separating from the employer herein on or about July 29, 2004 and filing for such benefits effective August 8, 2004. Although the claimant is not entitled to any unemployment insurance benefits and would be overpaid unemployment insurance benefits had he received any, the administrative law judge concludes that the claimant is not overpaid any such benefits because he has received none.

DECISION:

The representative's decision dated August 25, 2004, reference 01, is reversed. The claimant, Michael D. Lindemoen, is not entitled to receive unemployment insurance benefits until or unless he requalifies for such benefits because he was discharged for disqualifying misconduct. Since the claimant has received no unemployment insurance benefits, he is not overpaid any such benefits.

b/b