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

KIMBERLY S DYKE
29 BENNETT AVE
COUNCIL BLUFFS IA 51503

WEST CORPORATION
11808 MIRACLE HILLS DR
OMAHA NE 68154

Appeal Number: 04A-UI-12413-RT
OC: 10/31/04 R: 01
Claimant: Appellant (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

STATEMENT OF THE CASE:

The claimant, Kimberly S. Dyke, filed a timely appeal from an unemployment insurance decision dated November 19, 2004, reference 01, denying unemployment insurance benefits to her. After due notice was issued for a telephone hearing on December 14, 2004 at 10:00 a.m., the employer had not called in a telephone number, either before the hearing or 15 minutes after the hearing, where any witnesses could be reached for the hearing, as instructed in the notice of appeal. Although the claimant had called in a telephone number where she purportedly could be reached for the hearing, when the administrative law judge called that number at 10:00 a.m., the person who answered indicated the claimant was not there but was at the mall shopping and would be gone for a couple of hours. The administrative law judge

informed the person who answered that the claimant was aware of the hearing at 10:00 because she had called in this number for that hearing and that the administrative law judge was going to wait 15 minutes and if the claimant wanted to participate in the hearing, she needed to call within 15 minutes or by 10:15. The administrative law judge provided an "800" number for the claimant to call. The claimant did not call as of 10:21 a.m. Consequently, no hearing was held. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having examined the record, the administrative law judge finds: An authorized representative of Iowa Workforce Development issued a decision in this matter on November 19, 2004, reference 01, determining that the claimant was not eligible to receive unemployment insurance benefits because records indicate she was discharged from work on November 2, 2004 for violation of known company rule.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from employment was a disqualifying event. It was.

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).

Although neither party participated in the hearing, the administrative law judge concludes that the claimant was discharged on November 2, 2004. This was the date in the original decision and comports with the claimant's original claim date of October 31, 2004. Accompanying the fact finding is a document indicating, further, that the claimant was discharged on November 2, 2004. Accordingly, the administrative law judge concludes that the claimant was discharged on November 2, 2004.

In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. Although neither party participated in the hearing, the administrative law judge nevertheless concludes that there is a preponderance of the evidence in the administrative file that the claimant was discharged for disqualifying misconduct. In its protest, the employer stated that the claimant was terminated for harassing an employee. The employer participated in fact finding and stated that the claimant had sent an e-mail to a coworker threatening her supervisor. The employer also stated that it has a policy concerning workplace violence and that in every similar situation the employee is discharged. Accompanying fact finding is the employer's Harassment in the Workplace policy and a copy of e-mails sent by the claimant stating "if she comes my way I will punch her out and leave!!!! I am sooooooo serious!!!! I was just put on a pin number 3 for telling her to treat me with a little f**king RESPECT!!!" This statement seems to have been to sent to several individuals. At fact finding, the claimant stated that there were words added to the e-mail and that she had merely stated that she was punching out. The claimant seems to admit to the profanity in the e-mail and indicates that she had been put on a pin number 3 for using profanity in the past. Attached to the claimant's appeal is a statement indicating similarly that the e-mail was altered. Again, the claimant does not appear in her appeal to address the profanity, although in a copy of the e-mail attached to the claimant's appeal, she states that the profanity was added. At fact finding, the employer stated that the e-mail was not altered. Under the evidence here and in the absence of any other evidence to the contrary, the administrative law judge must conclude that the e-mail in the administrative file was not altered and the claimant did, in fact, state what is set out in the e-mail including the use of profanity. There is evidence that the claimant had received previous warnings for the use of profanity. The e-mail is clearly a threat and clearly uses profanity. The employer has a policy that prohibits this kind of behavior. Accordingly, the administrative law judge concludes that the claimant's sending of this e-mail was a deliberate act 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 interest and is, at the very least, carelessness or negligence in such a degree of recurrence, all as to establish disqualifying misconduct.

The administrative law judge notes 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. Myers v. Employment Appeal Board, 462 N.W.2d 734, 738 (Iowa App. 1990). Here, the claimant's e-mail was clearly offensive and profanity was used and it was disrespectful and name-calling and does not appear to have been an isolated incident. Accordingly, 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.

DECISION:

The representative's decision of November 19, 2004, reference 01, is affirmed . The claimant, Kimberly S. Dyke, is not entitled to receive unemployment insurance benefits, until or unless she requalifies for such benefits, because she was discharged for disqualifying misconduct.

tjc/tjc