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

MARGARET A SISSON
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MERCY HOSPITAL
ATTN HUMAN RESOURCES
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DES MOINES IA 50314

Appeal Number: 04A-UI-10579-RT
OC: 10-19-03 R: 02
Claimant: Appellant (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 96.5-1 – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant, Margaret A. Sisson, filed a timely appeal from an unemployment insurance decision dated September 27, 2004 reference 02, denying unemployment insurance benefits to her. After due notice was issued, a telephone hearing was held on October 20, 2004, with the claimant participating. The employer, Mercy Hospital, did not participate in the hearing because the employer did not call in a telephone number, either before the hearing or during the hearing, where any witnesses could be reached for the hearing, as instructed in the notice of appeal. Further, the administrative law judge received a statement from the employer by fax indicating that the employer would not participate in a telephone hearing and would not contest the claimant's claim.

FINDINGS OF FACT:

Having heard the testimony of the witness 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 administrative assistant to the president of Mercy College of Health Sciences from December 1, 2003 until she was given the option of resigning or being discharged on September 13, 2004. The claimant was informed that if she did not resign she would be fired. The claimant chose to resign. The claimant was given the option of resigning or being discharged because of alleged improper e-mails amounting to misconduct. The only e-mail of which the claimant was informed was an e-mail the claimant wrote to another secretary of the employer expressing some discontent that she had to run a personal errand for her supervisor, the president of the college, delivering a package in the area near where the claimant lived. The claimant would occasionally write e-mails for personal use but none were inappropriate or improper. The claimant was unaware that the employer prohibited such usage. The claimant was unaware of any policy or rule by the employer prohibiting such personal use or personal e-mails. The claimant never received any warnings or disciplines for this conduct. No other reasons were given to the claimant for her option to resign or be discharged and she was aware of none.

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 not.

Iowa Code Section 96.5-1 provides:

> An individual shall be disqualified for benefits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

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 24.26(21) provides:

> Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:
>
> (21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

The first issue to be resolved is the character of the separation. The claimant testified that she resigned but that she resigned when given the choice of resigning or being discharged. The employer did not participate in the hearing. A claimant who is compelled to resign when given a choice of resigning or being discharged is not considered to have voluntarily left. In lieu of any evidence to the contrary, the administrative law judge concludes that the claimant was compelled to resign when she was given the choice of resigning or being discharged and this is not a voluntary leaving and is treated, at least for unemployment insurance benefit purposes, as a discharge. Therefore, disqualifying misconduct must be determined.

In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge or a forced resignation, the claimant must have been discharged or forced to resign 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. 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. The employer did not participate in the hearing and provide sufficient evidence of deliberate acts or omissions on the part of the claimant constituting a material breach of her duties and/or evincing a willful or wanton disregard of an employer's interest and/or in carelessness or negligence in such a degree of recurrence so as to establish disqualifying misconduct. The claimant credibly testified that she was discharged for alleged improper use of the e-mails. However, the only e-mail specifically mentioned to the claimant was one that she wrote to a fellow coworker, another secretary, about her discontent in having to deliver a package for her supervisor on a personal errand. The claimant testified further that she occasionally used e-mail for personal use but that nothing that she did was inappropriate or improper. The claimant also testified that she was unaware that the employer prohibited such occasional personal use of e-mails. The claimant also testified that she had no knowledge of any policies

or rules by the employer prohibiting such personal use of e-mails or in any other way restricting or regulating e-mails. The claimant also testified that she had never received any warnings or disciplines for such behavior. The claimant testified that she was given no other reasons for her choice to resign or be discharged. The claimant's testimony was credible.

The administrative law judge concludes, in the absence of any evidence of warnings or disciplines or of a clear policy or rule by the employer prohibiting such e-mails, that the claimant's use of the e-mails including, and specifically, the e-mail to the coworker, were not deliberate acts or omissions by the claimant constituting a material breach of her duties and obligations arising out of her worker's contract of employment, nor do they evince a willful or wanton disregard of the employer's interest, nor do they establish carelessness or negligence of such a degree of recurrence as to establish disqualifying misconduct. At most, the claimant's use of the e-mails were good faith errors in judgment or discretion or ordinary negligence in isolated instances and not disqualifying misconduct.

In summary, and for all the reasons set out above, the administrative law judge concludes that the claimant was discharged or forced to resign 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. 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.

DECISION:

The representative's decision dated September 27, 2004, reference 02, is reversed. The claimant, Margaret A. Sisson, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she was discharged or forced to resign but not for disqualifying misconduct.

b/kjf