

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

TODD MCMULLIN
Claimant

APPEAL NO: 10A-UI-07907-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-LINE INTERNATIONAL
Employer

OC: 05/02/10
Claimant: Appellant (2)

Iowa Code § 96.5(2)(a) - Discharge for Misconduct

STATEMENT OF THE CASE:

Todd McMullin (claimant) appealed an unemployment insurance decision dated May 25, 2010, reference 01, which held that he was not eligible for unemployment insurance benefits because he was discharged from Hy-Line International (employer) for work-related misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on July 19, 2010. The claimant participated in the hearing. John Greenly observed the hearing on behalf of the claimant but did not participate. The employer participated through Keri Thomas, Human Resources Safety Coordinator. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

The issue is whether the employer discharged the claimant for work-related misconduct?

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was employed as a full-time laborer at the research farm from February 25, 2008 through May 4, 2010 when he was discharged for violation of the sexual harassment policy. The last few months the claimant had worked as a lead crew. The employer has zero tolerance for sexual harassment but some of its supervisors do not enforce the policy as written.

A female co-worker was artificially inseminating a rooster on April 14, 2010 but the rooster had a heart attack and died. The claimant told the co-worker, "If you stroke me like that, I would have a heart attack too." The claimant said he did not know the co-worker would find that statement offensive but she did and reported it to the claimant's supervisor on that same day. The supervisor told the claimant it was inappropriate and the claimant said he never made a similar comment after that. The supervisor failed to report the incident to the employer.

On April 29, 2010 the co-worker asked the employer what was being done about it, which was the first notice the employer had of the sexual harassment. The employer conducted an

investigation and questioned the claimant as to whether he made the comment. He admitted he made the inappropriate comment and was discharged on May 4, 2010.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a.

Iowa Code § 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.

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant was discharged on May 4, 2010 for sexual harassment after he made an inappropriate comment to a female co-worker on April 14, 2010. The claimant contends sexual harassment occurs all the time in the workplace but that does not excuse his actions. A reasonable person would know making a comment like that to a co-worker would be inappropriate.

However, the employer's supervisor failed to follow company policy and failed to notify the employer as to the claimant's actions. Consequently, the claimant was discharged almost three weeks after the fact. While past acts and warnings can be used to determine the magnitude of

the current act of misconduct, a discharge or disciplinary suspension for misconduct cannot be based on such past act(s). The termination or disciplinary suspension of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988). Inasmuch as the employer has not established a current or final act of misconduct, benefits are allowed.

DECISION:

The unemployment insurance decision dated May 25, 2010, reference 01, is reversed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/css