IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DENNIS A TOLAN
Claimant

POLARIS INDUSTRIES INC
Employer

APPEAL NO: 13A-UI-13069-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/23/12
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Dennis A. Tolan (claimant) appealed a representative's November 20, 2013 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with Polaris Industries Manufacturing, L.L.C. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on January 13, 2014. The claimant participated in the hearing and was represented by Larry Stoller, attorney at law. The employer's attorney, Holly Robbins, received the hearing notice and responded by sending a statement to the Appeals Section indicating that the employer was not going to participate in the hearing. During the hearing, Exhibits A-1 and A-2 were entered into evidence. Based on the evidence, the arguments of the claimant, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

OUTCOME:

Reversed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on October 2, 1995. He worked full time as a laborer/assembler. His last day of work was October 30, 2013. The employer discharged him on that date. The reason asserted for the discharge was harassment of another employee.

The persons working in the employer's manufacturing environment frequently used coarse or vulgar language. In November 2011 the claimant had been given a written warning for being disrespectful of others in his inappropriate use of language and behavior, viewed as being rude and antagonizing to other employees. After this warning, the claimant attempted to curb his behavior, but found it hard not to join in when his fellow employees, including his lead worker,

were engaging in the use of coarse or vulgar language. He did attempt to ensure that what he was saying was not directly offending anyone.

In October 2013 a new female employee began working in the claimant's area. The claimant forewarned her that language in the area could sometimes be coarse or vulgar, but she responded that she would not be offended and that she would join in the conversation. In fact, this woman did join in explicit conversation with a variety of employees in the area, such as how many times per week she had sex.

On or about October 22 the claimant and the woman were joking about being sent home early due to a lack of work; she commented, "I guess I've got more time for sex today." The claimant made a comment that "if you come home with me I will show you six inches of something you have never seen before." He immediately thought better of what he had said and asked if she was offended; she said she was not.

The claimant had taken off work the next day. When he returned to work on or about October 24, he learned that the woman had made a complaint about him to management. When questioned by management, the claimant did not deny making the statement. As a result, he was discharged for sexually harassing another employee.

REASONING AND CONCLUSIONS OF LAW:

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. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is sexual harassment of another employee through the making of the vulgar comment on or about October 22. The general

standard for establishing sexual harassment is that the action or comment be "unwelcome." The claimant asserted that his comment, while in general understanding would be considered vulgar, was not "unwelcome" as to the woman employee, as she had said she was not offended and she had engaged in similar conduct herself. Prior to the hearing in this case the claimant had pursued discovery in order to compel the employer to provide the name of the woman in question, so that the claimant could have obtained direct evidence from the woman as to whether or not she felt the claimant's statement was "unwelcome," or whether she might have been persuaded by others to make the complaint about the claimant even though she might not have in fact considered the conduct to be "unwelcome." Rather than comply with the claimant's discovery requests, the employer determined not to participate in the appeal hearing, and therefore did not provide the subpoenaed information regarding the woman. Where, without satisfactory explanation, relevant and direct evidence within the control of a party whose interests would naturally call for its production at hearing is not produced, it may be inferred that evidence would be unfavorable. *Crosser v. Iowa Department of Public Safety*, 240 N.W.2d 682 (Iowa 1976). Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant's vulgar comment constituted sexual harassment. Under the circumstances of this case, the claimant's making of the ill-advised comment was the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence, or was a good faith error in judgment or discretion, as compared to substantial misbehavior. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). The employer has not met its burden to show disqualifying misconduct. *Cosper*, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's November 20, 2013 decision (reference 01) is reversed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/pjs