

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ELMER CASTRO
Claimant

APPEAL NO: 12A-UI-14286-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

PALMER & COMPANY
Employer

OC: 10/28/12
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Elmer Castro (claimant) appealed an unemployment insurance decision dated November 26, 2012, reference 01, which held that he was not eligible for unemployment insurance benefits because he was discharged from Palmer & Company (employer) for work-related misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on January 15, 2013. The claimant participated in the hearing with Attorney Dennis McElwain. His son, Vitelio Castro, was present with the claimant but did not participate. Anna Pottebaum interpreted on behalf of the claimant. The employer participated through Hanna Cook, Human Resources Manager and Jesse Jurado, Assistant Plant Manager. Employer's Exhibits One and Two were admitted into evidence. 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 claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

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 hired as a part-time manufacturing employee on October 31, 2010 and went full time on February 16, 2011. The employer has a progressive disciplinary policy but the employer is not required to follow it. The claimant was discharged for violation of company policy after one previous verbal warning. He received the verbal warning on July 19, 2012 for making inappropriate and unwelcome comments to a female employee regarding her looks and personal features. At the time, the claimant admitted making inappropriate comments during a meeting with Human Resources Manager Hanna Cook and Assistant Plant Manager Jesse Jurado but he now denies making that admission. He testified in the hearing that he did make a harmless comment that was misinterpreted by his co-employee. Ms. Cook and Mr. Jurado testified the claimant was warned he would be terminated if it happened again but he denies receiving a warning.

The claimant was discharged after he again reportedly made inappropriate comments to a female co-worker on October 26, 2012. The comments upset the female employee to the point that she was crying and a supervisor asked her about it. She complained that the claimant stares at her constantly during the lunch hour and it makes her uncomfortable. The employee also reported that the claimant made comments about how beautiful she was and how beautiful her eyes are.

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 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.

The employer has the burden to prove the discharged employee is disqualified for benefits for misconduct. *Sallis v. Employment Appeal Bd.*, 437 N.W.2d 895, 896 (Iowa 1989). The issue is not whether the employer made a correct decision in separating claimant, 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 misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant

discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy. However, if it fails to meet its burden of proof to establish job-related misconduct as the reason for the separation, the employer incurs potential liability for unemployment insurance benefits related to that separation. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. In the case herein, the employer discharged the claimant after one verbal warning, but he denies receiving a warning.

Furthermore, the claimant denies making inappropriate comments both in July 2012 and in October 2012. The witnesses who accused the claimant of making inappropriate comments did not testify. The administrative law judge concludes that the hearsay evidence provided by the employer is not more persuasive than the claimant's denial of such conduct. The employer has not carried its burden of proof to establish that claimant acted deliberately in violation of company policy, procedure, or prior warning. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Benefits are allowed.

DECISION:

The unemployment insurance decision dated November 26, 2012, 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/tlls