

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

PAUL E DUNLAVEY
Claimant

APPEAL NO. 13A-UI-07018-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MASTERTSON PERSONNEL INC
Employer

OC: 06/10/12
Claimant: Appellant (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

The claimant filed a timely appeal from a representative's decision dated June 7, 2013, reference 02, which denied unemployment insurance benefits finding that the claimant was discharged from employment on May 23, 2013 for violation of a known company rule. After due notice was provided, a telephone hearing was held on July 16, 2013. The claimant participated. The employer participated by Mr. Jim Robertson, the employer's designated representative and witnesses, Jackie Cunningham, Dave Kampney and Curt Britson. Employer's Exhibits One through Eight were received into evidence.

ISSUE:

The issue in this matter is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Paul Dunlavey was employed by Mastertson Personnel, Inc. from December 10, 2012 until May 23, 2013 when he was discharged for violating the company's offensive language policies. Mr. Dunlavey was employed as a full-time development manager and was paid by salary plus commissions. His immediate supervisor was Ms. Dave Kampney.

On May 20, 2013, Mr. Dunlavey accompanied Jackie Cunningham, the Albert Lea Branch Manager, to a client location. In route, the claimant made comments about a recruiter who was assigned to work in Ms. Cunningham's office. The claimant made references to the recruiter's butt as being big. When Ms. Cunningham expressed her displeasure in that type of statement, the claimant made no further comments about the recruiter. Later that day, when visiting a client location, Mr. Dunlavey noticed an attractive female and made statements to Ms. Cunningham about the woman with sexual innuendos. On the return trip from the client location, Ms. Cunningham received a text from a female recruiter indicating that the recruiter had a flat tire. When the claimant was told to watch for the recruiter on the freeway, he again made a number of comments about the recruiter's butt.

The claimant's comments were reported by Ms. Cunningham to company management and the employer believed that the claimant's repetitive conduct was a violation of the company's offensive language policy and concluded that his conduct warranted termination. Before Mr. Dunlavey could be discharged, the employer received a report on May 23, 2013 from Ms. Cunningham reporting that the claimant had again made sexual innuendos regarding a female worker at a work location, making statements such as "I would like to get with that" and stating "she was too skinny and he would probably break her hip." Based upon these additional allegations, the company scheduled a meeting with Mr. Dunlavey. During the meeting Mr. Dunlavey denied making any sexual references or innuendos, only admitting that he had found the lady on May 23 to be attractive.

Because the claimant had received a copy of the company's handbook and its offensive behavior policies and because the employer considered Ms. Cunningham, who had been a long-time employee to be credible, a decision was made to terminate Mr. Dunlavey from his employment.

It is the claimant's position that he made no inappropriate comments or statements and that the allegations were contrived by Ms. Cunningham because the claimant had previously criticized Ms. Cunningham's performance because the claimant believed that Ms. Cunningham was threatened by his presence in the organization.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits. It does.

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 of proof in this matter. See Iowa Code section 96.6-2. Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. The focus is on deliberate, intentional or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

In this matter the testimony is disputed. The administrative law judge having considered the matter at length concludes that the employer has sustained its burden of proof in establishing that Mr. Dunlavey's discharge took place under disqualifying conditions. During the hearing of this matter the employer's witnesses testified with specificity as to the exact time, location and statements made by Mr. Dunlavey and the employer entered exhibits of contemporaneous statements made by witnesses at or near the time of the events. In contrast, Mr. Dunlavey has issued a general denial of any wrongdoing, asserting that Ms. Cunningham made untruthful allegations because she had been criticized by Mr. Dunlavey in the past. In response to the claimant's assertions, Ms. Cunningham testified at length, regarding the claimant's allegations that she had previously been unprepared or not properly performing the duties of her job.

The administrative law judge finds Ms. Cunningham to be a credible witness and finds that her testimony is not inherently improbable. The evidence in the record does not substantiate the claimant's assertion that Ms. Cunningham made false statements for her own purposes. The administrative law judge concludes that Mr. Dunlavey made these statements in question and that in doing so the claimant had violated the terms of the company's offensive behavior policy which prohibited unwelcome verbal conduct of a sexual nature creating an uncomfortable working environment for a fellow employee. Unemployment insurance benefits are withheld.

DECISION:

The representative's decision dated June 7, 2013, reference 02, is affirmed. The claimant is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount and is otherwise eligible.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

css/css