

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

METZ, DENNIS, E
Claimant

APPEAL NO. 12A-UI-10136-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 07/22/12
Claimant: Respondent (2-R)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the August 13, 2012, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on September 13, 2012. Claimant Dennis Metz participated. Julia Day of Corporate Cost Control represented the employer and presented testimony through Allison Skouge, Al Burns, Amber Baker, Dustin Baker, and Josette Vanderschaaf. Exhibits 1 through 12 were received into evidence.

ISSUE:

Whether Mr. Metz was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits. The administrative law judge concludes that Mr. Metz was discharged for misconduct in connection with the employment based on sexually harassing conduct and comments.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Dennis Metz was employed by Hy-Vee from 1977 until July 22, 2012, when Tom Daschle, Store Director, discharged him for sexually harassing comments and conduct. Mr. Metz started working at the Sioux City Hy-Vee in January 2011. Mr. Metz was the Kitchen Manager at the Sioux City Hy-Vee from January 2011 until he was discharged. Mr. Metz supervised more than a dozen kitchen employees. Josette Vanderschaaf was the Assistant Kitchen Manager and reported to Mr. Metz.

On July 17, 2012, Ms. Vanderschaaf told Allison Skouge, Manager of Perishables, of an incident wherein Mr. Metz had made inappropriate remarks to 21-year-old part-time kitchen clerk Amber Baker. This was Mr. Metz's superiors' first knowledge of the incident. Ms. Skouge interviewed Ms. Baker and another kitchen clerk, Dustin Baker, about the incident and then reported the matter to Mr. Daschle on July 20. The incident had occurred two months prior as Ms. Baker was removing dinner rolls from an oven. Mr. Metz had walked over to Ms. Baker and had made several double entendre sexual remarks to Ms. Baker. These included telling Ms. Baker that her buns looked nice, that her buns were golden, that her buns were hot, and that she had good-looking buns. Dustin Baker--no relation to Amber Baker--was working in the

kitchen at the time and overheard the comments. Mr. Baker readily recognized that the comments were inappropriate and to hold Mr. Metz the comments were “borderline sexual harassment.” Mr. Metz continued with the comments, laughed, and walked away.

On July 20, Mr. Daschle suspended Mr. Metz so that the employer could complete its investigation into Mr. Metz’s conduct and comments vis-à-vis the kitchen staff. In the course of the investigation, the employer learned of additional incidents wherein Mr. Metz had directed similar inappropriate comments or conduct toward kitchen employees. A week before Mr. Metz was suspended, Mr. Metz had walked up behind Ms. Baker as she was removing chicken from the rotisserie oven. Mr. Metz walked his fingers up Ms. Baker’s back. Ms. Baker was repulsed and scared by the unwelcome physical contact. Mr. Metz had on other occasions engaged in other unwelcome touching of Ms. Baker that included touching her shoulder, patting her back, rubbing her back, and going on about how she was the prettiest one in the kitchen or the beauty of the kitchen. Mr. Metz had on several occasions directed double entendre sexual remarks to another female kitchen clerk, Donna Ailts. Mr. Metz had engaged in unwelcome touching of Ms. Vanderschaaf while she was taking catering orders until Ms. Vanderschaaf told Mr. Metz that she did not feel comfortable touching her back or shoulder and Mr. Metz stopped directing that conduct toward her. On July 3, Mr. Baker had been at an event with Mr. Metz and several kitchen employees. Mr. Baker saw Mr. Metz walk up behind a 22-year-old female clerk and begin massaging her shoulders with his hands. On another occasion, Mr. Metz answered the phone when a law enforcement officer called to discuss a catering order. When the officer asked for Ms. Vanderschaaf, Mr. Metz hollered across that kitchen for Ms. Vanderschaaf and announced that her boyfriend was calling. Both Ms. Vanderschaaf and the officer were embarrassed by the inappropriate remark.

On July 22, Mr. Daschle interviewed Mr. Metz regarding the conduct that had come to light. Mr. Metz admitted to making some of the “bun” remarks to female employees, asserted he had been joking, been having fun, or another legitimate reason for the remarks. Mr. Metz denied any sexual aspect to the comments. Mr. Metz admitted to the incident concerning the telephone call from the law enforcement officer, but again indicated he had been joking. Mr. Metz denied having engaged in any inappropriate physical contact. Mr. Metz denied having been told by kitchen staff that his comments concerning the buns could be construed as sexually harassing. In other words, Mr. Metz admitted to the least egregious conduct, spun other allegations to minimize the seriousness, and flat denied the physical contact.

The employer had a written policy that prohibited sexually harassing conduct. Mr. Metz was aware of the policy.

REASONING AND CONCLUSIONS OF LAW:

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 benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). 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).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination 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).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The weight of the evidence establishes that Mr. Metz did in fact engage in a pattern of sexually harassing conduct directed at the female kitchen staff under his supervision. The employer presented testimony from multiple credible witnesses who provided remarkably consistent testimony concerning Mr. Metz's comments and physical actions vis-à-vis the female kitchen staff. The administrative law judge found no basis to discount or disregard the testimony and other evidence indicating a pattern of sexually harassing comments and contact.

Mr. Metz was discharged for misconduct. The fact that a member of management may have subsequently contacted Mr. Metz about returning to Hy-Vee does not negate the misconduct that prompted the discharge. Though the employer may not have told Mr. Metz specifically that

he was being discharged for sexual harassment, that was exactly what the conduct was. Mr. Metz is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Metz.

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The Agency representative's August 13, 2012, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account will not be charged.

This matter is remanded to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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