

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JEFFREY C GALL

Claimant

APPEAL NO. 08A-UI-07400-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FAREWAY STORES INC

Employer

**OC: 07/13/08 R: 04
Claimant: Respondent (1)**

Section 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

Fareway Stores, Inc. filed an appeal from a representative's decision dated August 7, 2008, reference 01, which held that no disqualification would be imposed regarding Jeffrey Gall's separation from employment. After due notice was issued, a hearing was held by telephone on September 2, 2008. Mr. Gall participated personally. The employer participated by Garrett Piklapp, Corporate Counsel. Exhibits One through Seven were admitted on the employer's behalf.

ISSUE:

At issue in this matter is whether Mr. Gall was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Gall was employed by Fareway Stores, Inc. from October 8, 2007 until July 18, 2008. He worked full time in the market. On July 8, 2008, Mr. Gall received a written warning based on coworker complaints. A coworker complained that on July 2, Mr. Gall grabbed her by the hips and put his hand in her back pocket. At about that same time, another employee reported that Mr. Gall had slapped her on her buttocks while she was bending over. As he did so, he wished her a happy birthday. The employer also learned in early July that he had told a coworker's wife that the last time he saw her was in his dreams. Mr. Gall was told that his conduct was considered sexual harassment. He signed the written warning on July 8, 2008.

The decision to discharge Mr. Gall was based on reports from two coworkers. One of them told management that Mr. Gall said on July 12 that they did not have to listen to Jennifer because she was a girl, blond, had blue eyes, and was stupid. Another employee reported that he referred to Jennifer as a "bitch" on July 12. Mr. Gall denied the allegations. He was suspended on July 14 and notified of his discharge on July 18, 2008.

REASONING AND CONCLUSIONS OF LAW:

An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). In order to impose a disqualification from job insurance benefits, the evidence must establish that the discharge was prompted by a current act of misconduct. See 871 IAC 24.32(8). The final conduct alleged by the employer was said to have occurred on July 12 when Mr. Gall made disparaging remarks about Jennifer. He denied making reference to her as a girl who had blond hair, blue eyes, and was stupid. He also denied making reference to her as a "bitch."

The employer did not present first-hand testimony from any individual who witnessed the conduct that occurred on July 12. Although two written statements were admitted, the authors were not offered as witnesses to be examined and cross-examined. Given Mr. Gall's denial of the allegations regarding July 12, and in the absence of sworn testimony from witnesses, the administrative law judge concludes that the employer failed to establish misconduct on Mr. Gall's part on July 12.

Mr. Gall may well have been guilty of misconduct regarding the conduct of May 10, May 17, and July 2. However, such conduct would not represent current acts in relation to the July 18 discharge date. Therefore, the administrative law judge need not determine whether the acts did, in fact, constitute misconduct within the meaning of the law. If the evidence does not establish a current act of misconduct, the administrative law judge is not free to consider other, past acts. For the reasons cited herein, the administrative law judge concludes that the employer has failed to satisfy its burden of proving that Mr. Gall was discharged for a current act of misconduct. Accordingly, benefits are allowed.

DECISION:

The representative's decision dated August 7, 2008, reference 01, is hereby affirmed. Mr. Gall was discharged, but a current act of misconduct has not been established. Benefits are allowed, provided he satisfies all other conditions of eligibility.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/kjw