

**IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI**

**ERIC HILL  
6 ORCHARD LN  
ESTHERVILLE IA 51334**

**COMES INVESTMENTS INC  
5084 NW 111<sup>TH</sup> DR  
GRIMES IA 50111**

**Appeal Number: 04A-UI-04755-ET  
OC 03-28-04 R 01  
Claimant: Respondent (2)**

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4<sup>th</sup> Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a – Discharge/Misconduct  
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the April 16, 2004, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on May 18, 2004. The claimant participated in the hearing. Alan Pottebaum, Area Manager, and Ed McGowan, Director of Operations, participated in the hearing on behalf of the employer. Employer's Exhibits One through Five were admitted into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time assistant manager for Comes Investments (Pizza Hut)

from May 13, 2001 to January 8, 2004. The employer has a sexual harassment policy and the claimant signed a form indicating he read and understood the policy (Employer's Exhibit One). On December 3, 2001, the claimant received a written warning regarding sexual harassment (Employer's Exhibit Two). The warning stated, "We will not tolerate any sexual harassment. Any further sexual comments will result in termination. Any effort to intimidate an employee will result in termination. This will stop immediately! No more comments about sexual content to any employee at all" (Employer's Exhibit Two). On December 30, 2003, Area Manager Alan Pottebaum received a call from Supervisor Mike Schneider stating employee Erin Degen's father contacted him to complain about the claimant making inappropriate sexual comments to his daughter. Mr. Pottebaum spoke to Mr. Schneider and the decision was made to insure the claimant and Ms. Degen were not scheduled together. Mr. Schneider also asked Ms. Degen to write a letter detailing the situation. On January 6, 2004, Ms. Degen provided a letter stating the claimant bragged about the size of his penis and that he had sex with 112 women (Employer's Exhibit Three). On January 8, 2004, the employer met with Ms. Degen and her father and she reiterated what she wrote in her written statement and also complained the claimant constantly called her house asking her to baby-sit and she was uncomfortable with that situation. Her father told the employer to tell the claimant that "any further calls to the Degen home would result in a call to the authorities" (Employer's Exhibit Four). Ms. Degen stated the claimant's comments were "unprovoked" and she had told him to stop. The employer also met with Beth Thompson, the employee that filed the original complaint against the claimant in December 2001. Ms. Thompson reported the claimant continually made comments about how attractive Ms. Degen was and that he was always "hanging around Ms. Degen," said things that appeared to embarrass her, rated women on their looks, and talked about having sex with over 100 women (Employer's Exhibit Four). The employer interviewed Shift Manager Adam Wooten and Mr. Wooten stated he had not heard any direct comments from the claimant to Ms. Degen but the claimant had stated several times he had the "hots" for Ms. Degen (Employer's Exhibit Four). The employer spoke to employee Dawn Buettner and Ms. Buettner said the claimant was telling co-workers that if he had the chance he would have sex with her and had told his wife so. Ms. Buettner also told the employer the claimant told her he had pornographic dreams about her. The employer met with the claimant and informed him of the complaints. The claimant indicated he might have made comments that could have been "misunderstood" and the employer terminated the claimant's employment January 8, 2004, for sexual harassment (Employer's Exhibit Five). The claimant testified he did not make any of the comments attributed to him by the other employees.

The claimant has claimed and received unemployment insurance benefits after the separation from employment.

#### REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). While the claimant denies making comments about the size of his penis or the number of women he has slept with, his statements were reported by more than one co-worker and the remarks were similar to those reported by Ms. Thompson in 2001, which resulted in the claimant receiving a written warning for sexual harassment. The claimant's comments were completely inappropriate and unprofessional and he knew or should have known that repeatedly making statements of a personal, sexual nature to any employee, much less a high school age girl, would not be tolerated by the employer. The December 2001 warning put the claimant on notice that a further incident could result in termination and his actions toward Ms. Degen were not an isolated incident. The claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. Consequently, the administrative law judge concludes the employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Benefits are denied.

Iowa Code Section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal

to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

**DECISION:**

The April 16, 2004, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as 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 claimant is overpaid benefits in the amount of \$1,288.00.

je/b