IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CASSANDRA VANENGEN
Claimant

DYNO OIL CO INC
Employer

APPEAL NO: 12A-UI-08804-B

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/17/12
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

Dyno Oil Company, Inc. (employer) appealed an unemployment insurance decision dated July 12, 2012, reference 01, which held that Cassandra VanEngen(claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a hearing was held in Spencer, Iowa on September 26, 2012. The claimant participated in the hearing. The claimant's mother, Shari VanEngen, participated pursuant to a subpoena. The employer participated through Nellie Nelson, Human Resources; Crystal Helmers, Manager; Joey Klaassen, Clerk; and Attorney Andrea Smook. Employer's Exhibits One and Two and Claimant's Exhibits A and B 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 employer owns and manages 11 convenience stores. The claimant was hired in Sibley, Iowa as a part-time clerk on May 5, 2010 but became full-time shortly thereafter and was promoted to an assistant manager in August 2011. She was discharged on June 22, 2012 for sexual harassment of a male subordinate. The employer did not have a handbook or any written policies addressing sexual harassment. The claimant was discharged without previous disciplinary warnings.

The claimant and her subordinate, clerk Joey Klaassen, were long-time friends and both admitted to regularly engaging in sexual banter at work, such as going to the back room and having sex. The claimant did not alter this relationship after she became the assistant manager because sexual comments, innuendos and actions were commonplace in the work environment. The previous store manager did not engage in this type of behavior but once Crystal Helmers became the manager, things changed and the claimant found it to be a "fun" place to work.

Ms. Helmers regularly "beagled" customers and co-workers, which reportedly meant she "dry-humped" them. She makes sexually suggestive comments, flirts with and hugs customers and vendors. Ms. Helmers ordered a sexual outfit in the mail and then took a picture of herself in it and showed Mr. Klaassen and Shari VanEngen, the claimant's mother, who also worked there. Ms. Helmers denied these allegations.

Ms. VanEngen testified that previously she was sexually harassed by a female co-worker. The co-worker "beagled" Ms. VanEngen and she also stuck her finger or thumb near Ms. VanEngen's buttock. Ms. VanEngen was offended by this conduct and reported it to Ms. Helmers at least four times but the reports were never investigated and/or never reported to the employer. Ms. Helmers eventually moved the co-employee to a different shift and that seemed to resolve the issue. Ms. VanEngen was questioned as to why she never reported it to human resources and she indicated that she was fearful to report anything to Nellie Nelson in human resources. Ms. VanEngen had seen at least one employee discharged when she jumped the chain of command and went over her manager's head to involve Ms. Nelson in the problem. Ms. Helmers denied knowledge of the sexual harassment.

The claimant typically worked until 5:00 p.m. and clerk Joey Klaassen began his shift at 4:00 p.m. On June 5, 2012, the claimant wanted to leave an hour early and she testified this was acceptable and a common practice if it was slow. She asked Mr. Klaassen if he cared if she left early and she eventually wrote and signed a statement, which was what ultimately led to her discharge. The claimant testified that Mr. Klaassen helped her write the statement and in the hearing, he admitted to helping her write part of the statement. The statement reads as follows:

"I Casey VanEngen promised Joey Klaassen that if he lets me leave at 4:00 p.m. from work I will go to any party he wants to take me to when he gets back from A.T. If I don't I have to allow him to do anything dirty (sexual to me)."

The claimant testified that Mr. Klaassen always wanted her to go to parties with him and she never would. Mr. Klaassen initially denied reading the letter before Ms. VanEngen left but later admitted he did read it before she left. On the following day, Mr. Klaassen left for his annual training in the military and it just so happened that Ms. Helmers was also in the same annual training. Mr. Klaassen showed Ms. Helmers the written statement on June 6, 2012 because he said he did not want to get "popped for it." Ms. Helmers apparently made a copy of it but then asked to see the original again a few days later. She contacted Ms. Nelson on June 6, 2012 but Ms. Nelson waited until the two employees were back from annual training on June 20, 2012 before any action was taken. In the meantime, Ms. Nelson happened to look at one of the cameras from the claimant's store on June 18, 2012 and saw the claimant and a male subordinate hugging. Ms. Nelson printed out the picture. Employee Cole Monier provided the claimant with a signed, written statement for the hearing which said that he initiated the hug on June 18, 2012. Mr. Monier also stated that Ms. Helmers told him at the time he was hired that there was "no sexual harassment policy."

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). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988).

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.

The claimant had received no previous disciplinary warnings but was discharged on June 22, 2012 for alleged sexual harassment that occurred on June 5, 2012. Although the employer did present a picture of the claimant hugging a male employee on June 18, 2012, that was not the primary reason for the termination. The employer did not have a sexual harassment policy, it provided no training on sexual harassment and it appears that sexual harassment was pervasive in the work environment. This was probably because the store manager not only condoned it but regularly engaged in it. Furthermore, the claimant and her male subordinate, the alleged victim, were long-time friends who often engaged in sexual banter between themselves. He admitted to the claimant after she was fired that he knew she was kidding and he acknowledged that fact in the hearing. So, while the claimant's actions were offensive and termination was warranted, the employer has not met its burden to prove she 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 July 12, 2012, reference 01, is affirmed. 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/pjs