

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

FRANK J NWANKPA
Claimant

HY-VEE INC
Employer

APPEAL 17A-UI-06533-NM-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 05/28/17
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the June 20, 2017, (reference 01) unemployment insurance decision that denied benefits based upon his discharge for violation of a known company rule. The parties were properly notified of the hearing. A telephone hearing was held on July 14, 2017. The claimant participated and testified. The employer participated through Hearing Representative Melissa Hill and witness Brian Bieker. Manager Josh Clark was also present on behalf of the employer but did not participate. Employer's Exhibits 1 through 5 were received into evidence.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as an assistant manager from December 11, 2013, until this employment ended on May 27, 2017, when he was discharged.

On May 15, 2017, an employee approached Bieker to report that two days prior, on May 13, claimant had grabbed her breast. The employee further reported that claimant had previously asked her out for drinks and texted her, despite the fact that she indicated she was not interested. The employee was very firm in her belief that claimant actively grabbed her and the conduct was intentional. She then provided a written statement of the incident. (Exhibit 5). The employer has a policy in place which strictly prohibits sexual harassment, including unwelcome advances or physical conduct. (Exhibit 4). Claimant was aware of this policy.

Bieker immediately began an investigation into the allegation, which included interviewing claimant, viewing security footage, and speaking to a potential witness. Bieker testified the angle on the security footage was not such that he could see what occurred between claimant and the employee. The potential witness Bieker interviewed could only state that he heard claimant and the employee talking, but said he was not looking at them and therefore did not

see anything. Claimant denied the allegations and further stated he had no conduct, deliberate or not, with the other employee on the date in question. Claimant similarly denied the allegations during his hearing testimony and also denied ever texting the employee. Claimant admitted he did tell the employee she was welcome to join him and her uncle, who was a friend, for a drink sometime, but denies the invitation was any sort of advance on her. Claimant was not sure of any reason why this employee would falsely accuse him of such a thing. Bieker ultimately determined the employee's allegations were credible and terminated claimant's employment. Bieker testified this determination was made based on the employee's demeanor, noting she was visibly upset and adamantly refused to work with claimant again.

Prior to this incident, claimant had two warnings for violating the sexual harassment policy. (Exhibit 1). The first warning was issued on June 10, 2015 and the second was issued on August 17, 2015. Both warnings dealt with situations where claimant was accused to have made unwelcome advances on customers. Claimant denied the allegations contained in both warnings. Claimant testified both warnings were related to the same customer complaint and the complaints were false allegations from the ex-boyfriend of a friend, who was also a customer. Claimant was advised in both warnings that further incidents would lead to termination.

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 proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). 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. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). The Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

The decision in this case rests, at least in part, on the credibility of the witnesses. It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

After assessing the credibility of the witnesses who testified during the hearing, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the employer's version of events to be more credible than the claimant's recollection of those events. While the employee did not testify, the employer did provide her detailed written statement of the incident. Bieker testified that at the conclusion of his investigation, he determined the employee's account of what occurred was credible. Bieker based his determination on his interviews with both parties and noted the complaining employee was visibly shaken and adamantly refused to work with claimant again. Bieker's conclusions are reasonable.

The employer has an interest and duty in protecting the safety of all of its employees. Claimant's behavior was in violation of specific work rules and against commonly known acceptable standards of work behavior. Due to nature of the behavior involved, specifically the physical contact, an employer would understandably be concerned about the safety of the individual reporting the harassment. Claimant's behavior was contrary to the best interests of employer and the safety of its employees and is disqualifying misconduct even without prior warning. Benefits are denied.

DECISION:

The June 20, 2017, (reference 01) unemployment insurance decision is affirmed. 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.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/rvs