

**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**

**CHRISTY L NEWTON
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**Appeal Number: 04A-UI-03595-L
OC 03-07-04 R 02
Claimant: Appellant (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, 4th 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.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the March 26, 2004, reference 02, decision that denied benefits. After due notice was issued, a hearing was held in Des Moines, Iowa on April 27, 2004. The claimant did participate with Curtis Aistrope and Eric Brown and was represented by Thomas Duff, Attorney at Law. The employer did participate through Forrest Haynes, Micah Mahaney. Claimant's Exhibits A – G were received.

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 security officer at the Federal Building in Des Moines

through March 4, 2004 when she was discharged. Claimant was suspended February 27, 2004 without pay.

Employer alleged that other security officers reported claimant was sexually harassing a Neuman Construction Company employee, Bobby and making sexually related remarks to coworkers. The alleged complainants did not participate in the hearing and all written statements indicated claimant did not make sexually explicit gestures, conversations or physical contact except hugging a VA employee contractor only after he asked claimant for hug. (Claimant's Exhibit G) Joel Mahoney (8:00 a.m. – 4:00 p.m. shift compared to claimant's 6:00 p.m. to 6:00 a.m. shift) responded to the questions in his statement: "none that I can recall. That's the way she talks normally." (Claimant's Exhibit B)

None of the five employees (Mike Martin, Bryan Wimberly, Joel Mahoney, Jackie Sciorrotta, and Lynn Hubbs) who allegedly made complaints or reports participated in the hearing or worked the claimant's shift. Claimant made complaints about Mike Martin, Brian Wimberly and Bill Hunt, Jeff Blaine during course of investigation. No one ever confronted her about her sexual conduct. Employer did not have specific dates for the alleged events but acknowledged there were no allegations of sexual misconduct after the January 29 staff meeting about the harassment policy.

Eric Brown, coworker who did work with claimant two days per week for part of her shift from 6:00 p.m. – 10:00 p.m., noted that she never touched him or others that he saw.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

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 Department of Job Service, 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. 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).

When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. Schmitz v. IDHS, 461 N.W.2d 603, 607 (Iowa App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code Section 17A.14 (1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. Schmitz, 461 N.W.2d at 608.

Most of the complainants' motive is questioned since claimant complained about their alleged racist remarks, thus their hearsay statements are not credible. Others did not work on claimant's shift and would not have been in a position to see the events alleged. The Neuman employee's full name was not known and he made no statements, verbal or written, to anyone. Furthermore, Eric Brown, the only security office to work with claimant, was credible in his statement that she did not behave inappropriately with him or others that he observed. Claimant has sufficiently rebutted employer's hearsay allegations and employer was unable to overcome that rebuttal. Benefits are allowed.

DECISION:

The March 26, 2004, reference 02, decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

dml/kjf