

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JAMES O HART
Claimant

ALLEN MEMORIAL HOSPITAL
Employer

APPEAL 20A-UI-01678-SC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 06/16/19
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

On February 24, 2020, James O. Hart (claimant) filed an appeal from the February 18, 2020, reference 08, unemployment insurance decision that denied benefits based upon the determination Allen Memorial Hospital (employer) discharged him for conduct not in its best interest. The parties were properly notified about the hearing. A telephone hearing was held on March 11, 2020. The claimant participated personally. The employer participated through Steve Sesterhenn, Vice President of Human Resources. The employer stated documents had been provided for the fact-finding interview. However, they were not submitted to the Appeals Bureau or the claimant prior to the hearing as the witness did not follow the instructions on the hearing notice and the documents were not admitted into the record.

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: The claimant was employed full-time as a Safety Tech beginning on September 9, 2019, and was separated from employment on January 29, 2020, when he was discharged. The employer has a policy prohibiting harassment in the workplace. The claimant was assigned to work with mental health patients. The employees in the mental health area regularly spoke about personal sexual issues, used profanity, and made inappropriate jokes at work.

On or about January 25, Steve Sesterhenn, Vice President of Human Resources, began an investigation into incidents that had been reported involving the claimant. The first incident occurred on January 17 when the claimant allegedly took a massage point tool from a female co-worker, placed it on the back of her neck, and made an inappropriate comment. He also allegedly pulled her hair in a sexual manner. The other reported incident occurred on January 20, when the claimant allegedly made comments about a female co-worker's posterior and body and called her "my bitch." (Sesterhenn Testimony.) When Sesterhenn questioned the claimant about the allegations, he acknowledged making some of the statements but indicated all of his co-workers made inappropriate comments at work, including calling him "my bitch,"

“boy,” and joking about him eating watermelon and fried chicken which he believed was due to his race as he is Black. (Claimant’s Testimony.) The claimant denied touching another employee. The employer made the decision to transfer the claimant to the Emergency Room while it investigated his allegations.

On January 27, as Sesterhenn was finishing the prior investigations, he learned of another incident that occurred on January 16 that had been reported to the employer’s global compliance alert line. The caller had reported that the claimant asked a female employee if she would have sex with a patient in exchange for money. Sesterhenn investigated that issue as well. The claimant denied the allegation but did acknowledge he and others were joking about the feelings a patient appeared to have toward one of the employees.

Sesterhenn concluded the investigation stating the claimant engaged in the conduct of which he was accused. The claimant had not received any prior warnings for similar conduct but was discharged on January 29. Another employee was disciplined as a result of the conduct uncovered during the investigation and all employees were given training and directives regarding the inappropriate conduct that occurred in the workplace.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32 provides, in relevant part:

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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The decision in this case rests, at least in part, upon the credibility of the parties. The employer did not present a witness with direct knowledge of the incidents alleged on January 16, 17, or 20. No request to continue the hearing was made to allow a first-hand witness to participate. As the claimant presented direct, first-hand testimony while the employer relied upon second-hand reports, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer.

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, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. 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).

What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. 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." Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

The employer has not met the burden of proof to establish that the claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. While the employer has a policy prohibiting certain conduct in the workplace, the parties agree that the employees in the claimant's work environment were engaging in behavior that may have violated that policy. The claimant has credibly testified that his conduct was no worse than that of his co-workers. Since the consequence of the claimant's actions was more severe than other employees received for similar conduct, the disparate application of the policy cannot support a disqualification from benefits.

Additionally, the employer had not previously warned the claimant about his conduct. 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. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. For the foregoing reasons, benefits are allowed.

DECISION:

The February 18, 2020, reference 08, unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.



Stephanie R. Callahan
Administrative Law Judge

March 24, 2020
Decision Dated and Mailed

src/scn