IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

LEROY W WRAY Claimant **THE UNIVERSITY OF IOWA** Employer	**APPEAL 14A-UI-12704-JCT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 11/16/14** **Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

The employer filed an appeal from the December 3, 2014 (reference 01) unemployment insurance decision that allowed benefits based upon the claimant's separation. The parties were properly notified about the hearing. A telephone hearing was held on January 26, 2015. The claimant participated. The employer was represented by Mary Eggenburg and participated through by Anita Cavanaugh and JoAnne Higgins.

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 custodian and was separated from employment on November 10, 2014 when he was discharged.

On September 19, 2014 human resources received a phone call from an assistant nurse manager that worked on a floor where the claimant performed custodial services. The manager filed a sexual harassment complaint against the claimant that involved a student employee. The complaint alleged the claimant went up behind the student employee who was seated in a chair and put his hands on her shoulders and whispered in her ear, thereby violating the employer's sexual harassment policy. The employer testified the claimant's conduct violated both its progressive disciplinary procedures and the employer's zero tolerance harassment policy.

Following the complaint, the employer conducted an investigation obtaining statements from the student worker, claimant, and others. The claimant asked the student employee if he could move her chair to vacuum under the desk she was working from. She said yes. The claimant said the employee remained in her chair, that he moved her chair by grasping the back of it, and pushed her with the chair back when he completed the vacuuming. He admitted he could have possibly inadvertently touched her back when grasping the chair but did not whisper or touch her shoulders. After the complaint, the claimant was removed from work on the floor where the

student worker was located. The claimant served a five-day suspension unrelated to the investigation and had some time off for personal reasons but otherwise performed work between September 19, 2014 and November 10, 2014; when the claimant was discharged for sexual harassment.

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 § 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:
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> 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.

Iowa Admin. Code r. 871-24.32(1)a, (4) provides:

> Discharge for misconduct.
>
> (1) Definition.
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> 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.
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> 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).
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> (4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

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.

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.

Given the serious nature of the proceeding and the employer's allegations resulting in claimant's discharge from employment, the employer's complete reliance on hearsay statements is unsettling. The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976). The decision in this case rests upon the credibility of the parties.

The employer had lodged very serious allegations against claimant with reports of complaints by several coworkers. The claimant testified he asked the student employee if he could move her chair to vacuum under her desk and it was possible that he touched her back inadvertently when pushing the chair. No evidence presented by the employer substantiated the claimant was coming up behind any employee and touching him or her inappropriately. The employer also alleged the claimant was whispering in the student employee's ear but could not verify what words were said. The claimant denied this allegation and testified he announced his intent to move the student employee's chair and she did not object or appear to be upset. Mindful of the ruling in *Crosser*, *id.,* and noting that 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.

Iowa Admin. Code r. 871-24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

It is troubling that there was a lapse of nearly fifty days from the final act until discharge when claimant was notified on the fourth day that his conduct was grounds for dismissal. Where an employer gives seven days' notice to the employee that it will consider discharging him, the date of that notice is used to measure whether the act complained of is current. *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988). An unpublished decision held informally that two calendar weeks or up to ten work days from the final incident to the discharge may be considered a current act. *Milligan v. Emp't Appeal Bd.*, No. 10-2098 (Iowa Ct. App. filed June 15, 2011). In this case, nearly fifty days is not a current act. The employer cannot on one hand argue that the claimant's conduct was so egregious that it warranted discharge instead of a lesser penalty but then allow the claimant to continue working for almost two months before determining he should be discharged. Inasmuch as employer had warned claimant about the final incident when he was moved from the mother/baby floor, to other floors, and there were no incidents of alleged misconduct thereafter, it has not met the burden of proof to establish that claimant acted deliberately or negligently after the most recent warning. The employer has not established a current or final act of misconduct.

The conduct for which claimant was discharged was at most an isolated incident of poor judgment and inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. In this case, the claimant moved a female employee's chair, which she was seated in so he could vacuum under her desk. She was alerted he was going to vacuum under her desk. No credible evidence substantiated the claimant violated the employer's sexual harassment policy. While the claimant's actions may have been unconventional, he is entitled to be put on notice that a future incident could result in his discharge. 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.

Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant. The employer has a responsibility and right to protect its employees from potential unsafe and harassing environments. This ruling simply holds that there was no current act of misconduct, and the claimant did not have the requisite level of intent or negligence for his conduct to qualify as misconduct under Iowa law, in part because the conduct for which the claimant was discharged was at most an isolated incident of poor judgment. The employer has not met the burden of proof and benefits are allowed. As the claimant is eligible for benefits, there is no overpayment.

DECISION:

The December 3, 2014 (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

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Jennifer L. Coe
Administrative Law Judge

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Decision Dated and Mailed

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