

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

WILLIAM R. GEORGE
Claimant

APPEAL NO. 10A-UI-14146-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

CITY OF DAVENPORT
Employer

OC: 10/05/10
Claimant: Respondent (2-R)

Section 96.5-2-a – Misconduct
Section 96.3-7 – Overpayment of Benefits

STATEMENT OF THE CASE:

The employer filed an appeal from a representative's decision dated October 5, 2010, reference 01, which held the claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on December 1, 2010. The employer participated by Dawn Sherman, director of human resources. The claimant did not respond to the hearing notice and did not participate in the hearing. The record consists of the testimony of Dawn Sherman.

ISSUES:

Whether the claimant was discharged for misconduct; and

Whether the claimant has been overpaid unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witness and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a municipality located in the state of Iowa. The claimant was hired on April 1, 2010, as a recreation building supervisor. He was a full-time employee. His last day of work was September 9, 2010. He was terminated on September 9, 2010.

The claimant was terminated after investigation of a claim of sexual harassment filed by one of the employees supervised by the claimant. This complaint was filed approximately one week prior to the claimant's termination. Dawn Sherman, director of human resources, investigated the complaint. The investigation included an interview of the complainant; interviews with co-employees; and an interview with the claimant, who was represented by an attorney.

As a result of the investigation, the employer determined that the claimant had made multiple statements to the female employee that were violations of the employer's sexual harassment policy. The claimant told the female about his sex life and invited the employee to join him and

his wife. He made comments about her breasts. He also told the female employee not to jump over the counter because she looked like a stripper on her pole. This latter comment was heard by other employees, who corroborated the complainant's allegations. The employer also discovered that the claimant had used the word "homos" after seeing two males on the street and had complained about getting those "darn homos out of here." The claimant admitted to this statement when interviewed by the employer.

The employer has a zero tolerance policy for sexual harassment. In its written policy, of which the claimant was aware, the employer prohibits any language or gestures that are offensive or insulting, such as sexual innuendos or gender specific comments.

REASONING AND CONCLUSIONS OF LAW:

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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Profanity or other offensive language in a confrontational or disrespectful context may constitute misconduct, even in isolated situations or in situations in which the target of the statements is not present to hear them. See Myers v. EAB, 462 N.W.2d 734 (Iowa App. 1990). In Henecke v. IDJS, 533 N.W.2d 573 (Iowa App. 1995), the Iowa Court of Appeals stated that an employer has the right to expect decency and civility from its workers. The employer has the burden of proof to show misconduct.

The greater weight of the evidence established that the claimant was discharged for violation of the employer's sexual harassment policy. A complaint of sexual harassment was filed by one of the female employees supervised by the claimant. The employer conducted a prompt and thorough investigation of the complaint. The female employee's complaint was corroborated by other witnesses. For example, other employees heard the claimant tell the employee that she looked like a stripper on her pole. Totally inappropriate remarks were made on more than one occasion.

The claimant did not participate in the hearing. The testimony from Ms. Sherman was credible and is the only evidence in this record concerning the claimant's conduct. The administrative law judge concludes that the claimant was terminated for misconduct as defined in Iowa unemployment insurance law. Benefits are denied.

The next issue is overpayment of benefits.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

This matter is remanded to the claims section for determination of the overpayment issue.

DECISION:

The representative's decision dated October 5, 2010, reference 01, is reversed. Unemployment insurance benefits shall be withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The overpayment issue is remanded to the claims section for determination.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/kjw