

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JERRY D BROMBAUGH
Claimant

APPEAL NO. 07A-UI-06382-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**MAHARISHI UNIVERSITY OF
MANAGEMENT**
Employer

**OC: 06/03/07 R: 01
Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

Maharishi University of Management filed a timely appeal from the June 20, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on July 18, 2006. Claimant Jerry Brombaugh participated. John Kennedy, Human Resources Director, represented the employer and presented additional testimony from David Shuman, Assistant Food Service Director. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Jerry Brombaugh was employed by Maharishi University of Management as a full-time cook's assistant from November 13, 2004 until May 31, 2007, when David Shuman, Assistant Food Service Director suspended him pending an investigation of whether Mr. Brombaugh had violated the employer's written sexual harassment policy. Human Resources Director John Kennedy, Chef Don Bowman, and Mr. Shuman subsequently decided to discharge Mr. Brombaugh and Mr. Shuman notified Mr. Brombaugh of the discharge by telephone on June 5, 2007.

The final incident that prompted the discharge occurred on May 31, 2007 and came to the employer's attention on the same day. Mr. Brombaugh was mopping a floor when Food Service Supervisor Kristi Stevens approached him from behind and touched him in a sore area of his back. Mr. Brombaugh spun around in response to being touched in a sore area. As Mr. Brombaugh turned around his hand made contact with Ms. Stevens' breast. There were no other witnesses to the May 31 incident. Ms. Stevens was upset by the physical contact and reported it to General Supervisor Charlie Simmons. Mr. Simmons went with Ms. Stevens to report the incident to Mr. Shuman. At the time, Ms. Stevens spoke with Mr. Shuman, she

alleged this was not the first time Mr. Brombaugh had touched her inappropriately. Ms. Stevens alleged that Mr. Brombaugh had a reputation of inappropriately touching numerous women and recommended that Mr. Shuman interview Food Service Supervisor Carrie Cooksey.

After Mr. Shuman received the report from Ms. Stevens, he located Mr. Brombaugh. Mr. Shuman told Mr. Brombaugh that he had received a report concerning Mr. Brombaugh's conduct. Mr. Brombaugh said he thought he knew what Mr. Shuman was talking about. Mr. Shuman told Mr. Brombaugh that he needed to send Mr. Brombaugh home while he investigated to see whether the report was truthful. Mr. Shuman did not interview Mr. Brombaugh regarding the incident or allegations.

On June 2, Mr. Shuman interviewed Ms. Cooksey. Ms. Cooksey alleged that Mr. Brombaugh had begun directing sexual innuendo toward her within a few days of her hire. Ms. Cooksey provided no specific details regarding any particular incidents.

After Mr. Shuman interviewed Ms. Cooksey, he met with Mr. Kennedy and Mr. Bowman. Based on the allegations, and the fact that the kitchen staff was predominantly female, Mr. Shuman, Mr. Kennedy and Mr. Bowman felt compelled to discharge Mr. Brombaugh from the employment to avoid conveying a message to the female employees that the employer did not take sexual harassment seriously. On June 5, Mr. Shuman left a message on Mr. Brombaugh's telephone indicating that he was discharged from the employment.

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.

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

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. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The greater weight of the evidence in the record fails to establish that Mr. Brombaugh intentionally touched Ms. Stevens' breast or otherwise engaged in sexually harassing behavior on May 31, 2007. The evidence indicates that the employer failed to fully investigate the incident by not questioning Mr. Brombaugh regarding what had occurred. The employer otherwise cut short its investigation of the allegation(s) against Mr. Brombaugh. Ms. Stevens' allegation against Mr. Brombaugh may or may not have represented what actually occurred. Because the employer did not interview Mr. Brombaugh, and because Ms. Stevens did not testify at the hearing, the administrative law judge lacks sufficient evidence upon which to conclude misconduct occurred. Ms. Cooksey's statement provided additional allegations, but no proof of those allegations. The administrative law judge notes that Ms. Cooksey did not testify. The employer had the ability to present more direct and satisfactory, but failed to present such evidence to rebut Mr. Brombaugh's version of events. The employer, not Mr. Brombaugh, had the burden of proof in this matter.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Brombaugh was discharged for no disqualifying reason. Accordingly, Mr. Brombaugh is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Brombaugh.

DECISION:

The Agency representative's June 20, 2007, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs