

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**RICHARD D HUSS**  
Claimant

**APPEAL NO: 17A-UI-09820-TN-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**THE EASTER SEAL SOCIETY OF IA INC**  
Employer

**OC: 08/27/17**  
**Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

Richard D. Huss, the claimant, filed a timely appeal from a representative's decision dated September 15, 2017, reference 02, which denied unemployment insurance benefits finding that he was discharged from work on August 29, 2017 for a known company rule. After due notice was provided, a telephone conference hearing was held on October 11, 2017. Claimant participated. The employer participated by Ms. Sara Hardy, Human Resource Generalist and Mr. Thomas Short, Director of 24 hour Client Programs. Employer Exhibits 1, 2, 3 and 4 were admitted into the hearing record.

**ISSUE:**

Whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

**FINDINGS OF FACT:**

The administrative law judge, having considered all of the evidence in the record, finds that: Richard Huss was employed by The Easter Seal Society of IA, Inc. from March 28, 2016 until August 29, 2017 when he was discharged. Mr. Huss worked full-time as a Support worker for Easter Seal Society clients and was paid by the hour. Mr. Huss was discharged August 29, 2017, after a female worker complained that Mr. Huss had sent her a lengthy text message that morning containing graphic and obscene statements concerning her body and sexual activities that the claimant was fantasizing.

The female worker was angry and upset and considered leaving her employment because of the incident. The worker also indicated that the communication was not consensual and in violation of the Society's zero tolerance policy regarding sexual harassment.

Mr. Short read the contents of the text message. The text contained numerous explicit and graphic references to the female worker's anatomy and a graphic account of sexual activity that Mr. Huss was fantasizing as taking place between himself and the female worker. (See Employer's Exhibit 1).

Mr. Huss concluded the approximate 200 word sexually explicit text stating “even though this was a fantasy, I think we both wanted it to be a reality... I hope I never accidentally send this text, because if I do it’s going to be sexual harassment big time.” The claimant then made reference to another document with other explicit accounts of sexual activity that he had written about the female worker.

The Easter Seal Society of IA, Inc. has a written policy prohibiting sexual harassment. The policy prohibits suggestive comments, sexual language, obscene general related comments, sexual remarks about a person’s body and sexual activities. The company’s policy describes sexual harassment as unwelcome sexual advances that have the effect of creating an intimidating, hostile or offensive work environment for employee’s. The policy includes electronic transmissions. Employees are warned, they are subject to discharge if they violate the company’s zero tolerance sexual harassment policy.

Mr. Huss was aware of the policy and had acknowledged and received it in the company handbook.

Prior to discharging the claimant, Mr. Short met with him to give Mr. Huss an opportunity to explain his actions.

Mr. Huss agreed that he had written the text message and had addressed it to the female worker but stated he did not intend to send it.

It is the claimant’s position that his act was not intentional and that there was not a sufficient connection between his conduct that took place during non-working hours and away from a place of employment, and his job with The Easter Seal Society of IA, Inc. Mr. Huss asserts that the communication was one between “consenting adults” and had no connection with his employment.

**REASONING AND CONCLUSIONS OF LAW:**

The question before the administrative law judge is whether the evidence in the record establishes job related misconduct on the part of the claimant sufficient to warrant the denial of unemployment insurance benefits, it does.

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

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." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.*

In the case at hand, the claimant prepared a lengthy text message that was addressed to a female worker, employed by The Easter Seal Society of Iowa, Inc. that was filled with graphic and prurient references to the female worker's anatomy and graphic sexually explicit accounts of his fantasy of sexual intercourse between himself and the female co-worker.

In addition to repeated sexual explicit description of her anatomy and graphic accounts of imagined sex acts, Mr. Huss expresses the possibility that the female worker might join him in making the fantasy that he described a "reality". In conjunction with that statement, Mr. Huss also acknowledges in the text message that the message constitutes sexual harassment "big time".

It is the claimant's position that his conduct should not disqualify him for unemployment insurance benefits because he did not send the text message intentionally, but only did so accidentally, and that there was not a sufficient connection between his off-duty conduct and his employment with the company. The administrative law judge does not agree.

The administrative law judge concludes that there was a sufficient nexus or connection between the claimant's off-duty conduct and his employment The Easter Seal Society of IA, Inc. Mr. Huss identified a female employee of the company where he was employed as to be the recipient of graphic sexual descriptions of her body and graphic details of sexual exploits that the claimant fantasized. The claimant's motivation was wrongful. The claimant was motivated by self-interest, self-gratification, and perhaps the remote "that if the message was sent, it might invoke a similar response by the female recipient. The carelessness on the part of the claimant

that resulted in the message being sent to the female worker was inextricably tied to his wrong intent and constitutes misconduct sufficient to warrant the denial of unemployment insurance benefits.

By his own admission the claimant knew that his conduct would be considered to be sexual harassment. The effect upon the female recipient was foreseeable and resulted in creating an offensive hostile work environment, the worker's threat to quit employment, and filing an official complaint of sexual harassment on the part of Mr. Huss.

The administrative law judge concludes the claimant was discharged for misconduct in connection with his work. Accordingly, the claimant is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times her weekly benefit amount and is otherwise eligible.

**DECISION:**

The representative's decision September 15, 2017, reference 02, is affirmed. The claimant was discharged from work for job related misconduct. Unemployment insurance benefits are withheld until the claimant and has worked in and been paid wages for insured work equal to ten times his weekly benefit amount and is otherwise eligible.

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Terry P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

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