IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CARL A WELCH Claimant **IA WESTERN COMM COLL MERGED** Employer	**APPEAL NO. 09A-UI-17021-SWT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 10/11/09** **Claimant: Appellant (2)**

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

The claimant appealed an unemployment insurance decision dated October 29, 2009, reference 01, that concluded he was discharged for work-connected misconduct. A telephone hearing was held on February 9, 2010. The parties were properly notified about the hearing. The claimant participated in the hearing with his representative, Michael Tulis, Attorney at Law. Joan Ryan participated in the hearing on behalf of the employer with witnesses, Dixie Blevins, Allen Myers, Derek Lumsden, and Greg Clausen. Exhibits 5, 6, 7, 9, and 11 were admitted into evidence at the hearing.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant worked for the employer as a maintenance worker from June 2005 to October 9, 2009. The employer discharged the claimant on October 9, 2009, based on reports from two staff members about inappropriate conduct by the claimant as described below.

On September 15, 2009, the claimant and the security supervisor, Dixie Blevins were in the cafeteria. Blevins was talking to other employees about the double door to the cafeteria. She called the wood piece dividing the doors as a removable center doorframe. The claimant chimed in that the piece was “actually called a mullion.” Blevin took offense at being corrected and the claimant injecting himself into the conversation. She retorted that the employees knew what she was talking about.

On September 16, 2009, the claimant and Blevins were on the same floor of a dormitory during a scheduled power outage that darkened the hallways of the dorm. In the dark, Blevins and a male student exited a bathroom and almost collided. This startled Blevins and she giggled. The claimant heard Blevins giggle, and the claimant giggled using the same tone as Blevins used. Blevins became upset and told the claimant not to mock her. Blevins then asked the claimant what his problem was and insisted that he was acting different toward her. The claimant asked Blevins if she was referring to the incident in the cafeteria the day before. He maintained that

he was just telling her the proper terminology for the door piece. Blevins considered the comment condescending and told the claimant that he needed to "check himself." The claimant walked away stating he was sorry he upset her and that he had to get back to work.

Blevins then reported what had transpired to management and also reported that the claimant had blew kisses as he drove by her while she was working on campus sometime in the past. The claimant had done this on a couple of occasions, as they would often pass each other on campus. He normally waved, but blew a kiss a couple times, as an alternative pleasantry. Nothing of a romantic or sexual nature was intended by the gesture. Blevins never told the claimant to stop doing it.

After Blevins made her complaint about the claimant, the employer started an investigation. On September 28, a resident life coordinator, Lyndsie Gibbs, reported that once in July 2009, the claimant had entered the building she worked in and had blown her a kiss. The claimant did this, but again nothing romantic or sexual was intended. Gibbs reported this to another resident life coordinator, but nothing was done at the time.

A student who worked with the claimant during the summer 2009 told Gibbs that the claimant had made crude comments to him about Gibb's appearance and dress. Gibbs reported this to management as well. The student's story was untrue as claimant never made the comments attributed to him. Gibbs also reported that a male resident assistant had complained to her that the claimant had told a group of RAs his "best pickup lines," which included some crude language. In actuality, the claimant had discovered a poster in the dorm on which residents had written their "Best Pickup Lines." He told the RAs he objected to the poster and told them some of what was on the poster that he objected.

On October 9, 2009, the maintenance director and maintenance supervisor confronted him about the allegations made by Blevins and Gibbs. The claimant told them that certain things were true but were taken out of context and he did not do the other things, but he did not think it would do any good to say anything. The employer took this statement as confirmation that the claimant had acted inappropriately and discharged him.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

The unemployment insurance law disqualifies claimants discharged for work-connected misconduct. Iowa Code § 96.5-2-a. The rules define misconduct as (1) deliberate acts or omissions by a worker that materially breach the duties and obligations arising out of the contract of employment, (2) deliberate violations or disregard of standards of behavior that the employer has the right to expect of employees, or (3) carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design. 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 misconduct within the meaning of the statute. 871 IAC 24.32(1).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of

unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

The findings of fact show how I resolved the disputed factual issues in this case by carefully assessing of the credibility of the witnesses and reliability of the evidence and by applying the proper standard and burden of proof. Blevins testified that the claimant had told her to “check herself,” he had blown a kiss to her when he left on September 16, and she had told him in the past to stop throwing her kisses. Her statement made on the same day would seem to be more reliable and none of these things are mentioned.

There is no question the claimant was annoying but that does not prove sexual harassment or willful and substantial misconduct. Furthermore, while blowing a kiss is a foolish gesture and I am not convinced it is any kind of American Sign Language sign for friendliness, as the claimant asserts, the isolated incidents established do not prove misconduct, especially in the absence of any warnings about such conduct. Also, the employer has not proven by a preponderance of the evidence the claimant committed the conduct reported by the student worker Finally, I do not believe for a minute that the claimant was telling the RAs his best pickup lines.

While the employer may have been justified in discharging the claimant, work-connected misconduct as defined by the unemployment insurance law has not been established.

DECISION:

The unemployment insurance decision dated October 29, 2009, reference 01, is reversed. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

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Steven A. Wise
Administrative Law Judge

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Decision Dated and Mailed

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