IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JOSE G BENAVIDES
Claimant

WINNEBAGO INDUSTRIES
Employer

APPEAL NO. 10A-UI-17018-DWT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/04/10
Claimant: Appellant (1)

Iowa Code § 96.5-(2)a - Discharge

PROCEDURAL STATEMENT OF THE CASE:

The claimant appealed a representative's December 10, 2010 determination (reference 01) that disqualified him from receiving benefits and held the employer's account exempt from charge because he had been discharged for disqualifying reasons. Telephone hearings were held on January 25 and March 8, 2011. The claimant participated in the hearings with his attorney, Maria Vera. Scott Folkers, attorney at law, represented the employer. William Rolling, Arnold Gray, Judith Blumenthal, Carin Bolie, Ruth Najar, Lynda Van Syok, Barry Bendickson, and Larry Kluckhohn appeared or were available to appear on the employer's behalf. Celia Huante interpreted the hearings. During the hearing, Employer Exhibits One through Five were offered and admitted as evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge finds the claimant is not qualified to receive benefits.

ISSUE:

Did the employer discharge the claimant for reasons constituting work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer in March 2002. He worked as a full-time production assembler, fabricator. Arnold Gray supervised him. When the claimant started working, he received a copy of the employer's handbook. (Employer Exhibit Four.) The handbook informs employees that the employer does not allow harassment at work. This includes hitting or other aggressive physical conduct. The employer also does not allow horseplay or other types of disorderly conduct. If an employee engages in harassment or horseplay, the employee could be terminated. (Employer Exhibit Five.)

In September 2004, the employer investigated an incident where the claimant allegedly inappropriately touched a male and female co-worker at work. When the employer talked to the claimant, he denied he had inappropriately touched any co-worker. He explained that he had been put in a headlock during the incident. (Employer Exhibit One.) The employer concluded the claimant inappropriately touched a male co-worker. The employer disciplined him by giving him a written warning and suspended him for 4.5 days for touching a male co-worker inappropriately. (Employer Exhibit Two). Although the claimant signed the written warning, he

did not initially understand why he received the written warning or was suspended. After he contacted an interpreter, he understood what the employer accused him of doing, why he had been suspended, and that his job was in jeopardy. The warning states, "Unless immediate improvement is shown, further disciplinary action will be taken."

The employer had no knowledge of any other problems with the claimant until November 10, 2010. While the claimant was on a medical leave, Ashland commented to a co-worker, Najar, that he did not miss the claimant. When Najar questioned why Ashland would make such a comment, he told her that he was tired of the claimant punching him in the arm, grabbing his butt and private areas. While this had been going on for a couple of years, Ashland did not report anything to Gray. Gray had not observed this conduct between the two of them.

Najar reported Ashland's comment to Gray. Gray investigated and learned that another employee, Bolie, saw the claimant grab Ashland's butt a few weeks earlier. When Ashland told the claimant to stop, the claimant walked away laughing.

Ashland and the claimant have worked together for about nine years. While the claimant and Ashland may have been joking around initially, Ashland got tired of the claimant hitting him in the shoulder and grabbing him. The claimant, however, did not stop when Ashland told him to stop.

Based on the employer's investigation, the employer discharged the claimant on November 15, 2010, for violating the employer's harassment policy. Since the employer suspended the claimant in September 2004 for similar conduct, the employer concluded the claimant knew the employer did not allow this kind of conduct at work. (Employer Exhibit Three.)

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges him for reasons constituting work-connected misconduct. Iowa Code § 96.5(2)a. 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 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).

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good-faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

Even if the claimant did not understand on September 20, 2004, why the employer suspended him, he understood a short time later after an interpreter explained the reasons for his suspension. The claimant understood six years ago that his job was in jeopardy if he again touched a co-worker inappropriately.

The claimant and Ashland have worked together for nine years. The claimant's testimony that they goofed around at break is not disputed. When they first started goofing around, there were not any problems. However, after two years of this conduct, Ashland got tired of the claimant punching him in the shoulder and grabbing his butt. Bolie supported Ashland's testimony that he told the claimant to stop. In early November 2010, the claimant still thought it was a joke and laughed when he walked away after Ashland told him to stop. The claimant took the horseplay or goofing around with Ashland too far. Instead of listening to and respecting that Ashland no wanted to engage in that type of behavior, the claimant continued to bother Ashland. The facts illustrate how much the claimant bothered or harassed Ashland when Ashland told Najar he did not miss the claimant when he was on a medical leave. It is unfortunate that Ashland did not go to Gray earlier so the three of them could discuss what was happening and make the claimant understand that he was violating the employer's harassment policy. On the other hand, when Ashland told the claimant to stop or to leave him alone, the claimant's failure to respect Ashland's request amounts to an intentional and substantial disregard of the standard of behavior the employer has a right to expect from an employee. The claimant committed work-connected misconduct when he refused to leave Ashland alone after Ashland told him to. As of November 14, 2010, the claimant is not qualified to receive benefits.

DECISION:

The representative's December 10, 2010 determination (reference 01) is affirmed. The employer discharged the claimant for reasons that constitute work-connected misconduct. The claimant is disqualified from receiving unemployment insurance benefits as of November 14, 2010. This disqualification continues until he has been paid ten times his weekly benefit amount for insured work, provided he is otherwise eligible. The employer's account will not be charged.

_____
Debra L. Wise
Administrative Law Judge

_____
Decision Dated and Mailed

dlw/kjw