

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DAVID M ARMBRECHT
Claimant

APPEAL NO. 08A-UI-06543-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

PEPSIAMERICAS SALES SERVICES LLC
Employer

OC: 06/15/08 R: 02
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed an appeal from a representative's decision dated July 7, 2008, reference 01, that held the claimant eligible for unemployment insurance benefits. After due notice a telephone conference hearing was scheduled for and held on July 30, 2008. The claimant participated. The employer participated by Ellie Nichel, Human Resources Generalist; Mike Loy, Account Sales Manager; and Doug Neuendorf, Warehouseman.

ISSUE:

The issue in this matter is whether the claimant was discharged for intentional disqualifying misconduct in connection with his work.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: The claimant worked for this employer from June 2003 until February 26, 2008 when he was discharged from employment. Mr. Armbricht held the position of full-time sales support supervisor and was paid by salary.

The claimant was discharged on February 26, 2008 for an incident that was alleged to have occurred on February 8, 2008. On that date the claimant was expressing dissatisfaction with the inaction of a female Human Resource manager who was reluctant to discharge an employee that Mr. Armbricht felt needed to be discharged from employment. Two employees reported to company management that the claimant in expressing dissatisfaction stated in reference to the Human Resource worker, "She should be bent over a table." The claimant was allowed to continue working from the date of the incident on February 8, 2008 through February 26, 2008 when he was discharged without being given a reason. Although Mr. Armbricht repeatedly asked for the basis for his termination, the employer was unwilling to provide that information to the claimant. Prior to being discharged the claimant had received no previous warnings or counselings from the employer for violation of the company's anti sexual harassment policy or any other related conduct. Mr. Armbricht is aware of the company's

sexual harassment policy but denies violating it. It is the claimant's position that he does not believe that he made the statement attributed to him.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Armbrecht was discharged for intentional violation of a company policy. It does not.

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 insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate intentional culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Court of Appeals 1992).

While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on past acts. The termination of employment must be based on a current act. See 871 IAC 24.32(8).

The evidence in the record establishes that Mr. Armbrecht had not been previously warned or counseled for a violation of the company's sexual harassment policy or any related conduct. The evidence is uncontradicted that at the time the alleged statement was made Mr. Armbrecht was upset at what he considered to be the reluctance of the Human Resource manager to discharge an employee who the claimant believed repeatedly violated company policy. The claimant does not recall making the statement attributed to him.

The administrative law judge, based upon the evidence in the record, concludes that the claimant did make an inappropriate statement in reference to an employee while agitated and upset because of the employee's failure to act on what the claimant considered to be a reasonable request. Although the administrative law judge does not condone nor sanction the use of inappropriate language, innuendo or sexually related comments, the administrative law judge concludes that the claimant's conduct was an isolated incident of poor judgment in an otherwise unblemished employment record.

The question before the administrative law judge is not whether the employer has a right to discharge Mr. Armbrecht for these reasons but whether the discharge is disqualifying under the provisions of the Employment Security Law. While the decision to terminate the claimant may have been a sound decision from a management viewpoint, the administrative law judge concludes that the claimant's conduct did not rise to the level of intentional disqualifying misconduct that would warrant the denial of unemployment insurance benefits. It was an isolated instance of poor judgment.

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.

For the reasons stated herein, the administrative law judge concludes that the claimant was discharged under non disqualifying conditions. Unemployment insurance benefits are allowed, providing the claimant meets all other eligibility requirements.

DECISION:

The representative's decision dated July 7, 2008, reference 01, is hereby affirmed. The claimant was dismissed under non disqualifying conditions. Unemployment insurance benefits are allowed, providing the claimant meets all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs