IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ROBERT PARSONS
Claimant

DEERE & COMPANY
Employer

APPEAL NO. 12A-UI-11591-W

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/22/12
Claimant: Respondent (2R)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Employer filed an appeal from a fact-finding decision dated September 21, 2012, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, an in-person hearing was scheduled for and held on December 17, 2012 at the Iowa Workforce Development administrative office at 1000 East Grand Avenue. Claimant participated through attorney Christopher Coppola. Employees, Timothy Whitaker and Justin Nelson both testified on behalf of the claimant. Employer participated by attorney, Joseph Quinn. Jim Rottinghaus, Manager of Labor Relations was the employer's representative. Employer Exhibits A-D were admitted into evidence, as were Claimant Exhibits 1-2.

ISSUE:

The issue in this matter is whether claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds:

Claimant was employed as a laborer at John Deere Des Moines Works. He worked there for approximately 8 years. In 2010, he was terminated for a serious offense. Through negotiations with the Union, he was brought back to work under a "last chance agreement" and given a final warning. This agreement essentially placed the claimant on a three-year probationary period.

Claimant became friends with an African employee named Kon Lueth. The two engaged in good-natured workplace banter which was, at times, inappropriate for a professional workplace. Between the claimant and Mr. Lueth this conduct was generally acceptable. They engaged in this type of conduct in front of their co-workers.

On August 23, 2012, claimant placed a piece of piece of packing Styrofoam on his head and called out to Mr. Lueth. The parties dispute the claimant's intent. Other employees were present. Mr. Lueth laughed and then asked the claimant if he could photograph him. The claimant posed for a photograph. Mr. Lueth complained two days later that he felt the conduct

was inappropriate and discriminatory. Following an investigation and internal hearing, claimant was discharged on August 27, 2012 by employer for violation of the employer's non-discrimination policy and "last chance agreement."

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.

871 IAC 24.32(8) provides:

> (8) Past acts of misconduct. 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 such past act or acts. The termination of employment must be based on a current act.

871 IAC 24.32(4) provides:

> (4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In cases where a suspension or

disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct.

In this matter, the evidence established that claimant was discharged for an act of misconduct when claimant violated employer's nondiscrimination policies.

According to its policy, John Deere "is committed to maintaining a worldwide business environment which is free from discrimination and harassment." Their policy prohibits discrimination or harassment from "either intentional or un-intentional acts and may be verbal, physical, or visual." Discrimination is defined. It "consists of any practice or behavior that has a negative effect on an individual or group, resulting from unequal or unfair treatment ..." based upon a protected classification such as race. Harassment is defined as a form of discrimination which is "any unwelcome conduct interfering with work performance or creating an intimidating, hostile or offensive working environment." The employer had begun increased enforcement of this policy in the past year prior to this incident.

The question is whether the claimant violated the employer's work rules or a universal standard of acceptable employment behavior, by engaging in the conduct described herein. For the following reasons, the undersigned finds that the employer met its burden of proof. The claimant committed work-related misconduct.

The claimant essentially has two defenses. The first is that there was nothing inappropriate about his behavior; that is, his intentions were misunderstood. The second is that he and Mr. Lueth had both engaged in consensual, good-natured teasing and that neither was truly offended, even if some of the banter could have been offensive to outsiders.

The claimant's first defense is hard to believe because of the photographic evidence. The claimant posed for a photograph where he appears to be performing some type of Nazi salute with a makeshift KKK hood perched on top of his head. The claimant's explanation that his intent was to give the appearance of a dunce cap and tease Mr. Lueth for taking an unscheduled break is not credible. During his explanation, the claimant appeared nervous. He repeatedly explained that the Styrofoam piece was falling from his head and demonstrated that he was attempting to catch it. He also claimed he was pointing at Mr. Lueth to stop him from taking the picture while he adjusted the Styrofoam. In the photograph, however, his left arm is firmly planted on his hip, not catching the Styrofoam. And his right hand is straight out in a salute fashion with his heels together. It is remotely possible that the photo caught the claimant at an awkward second in time which gave the appearance of something it was not, but this does not seem likely. The most likely scenario is that the claimant was performing a Nazi salute with a piece of Styrofoam on his head which looked like a KKK hood. The claimant therefore is not credible.

The claimant's second argument is intriguing. By the terms of the employer's policy, for conduct to amount to "discrimination" or "harassment" it must be unwelcome or have a negative effect on a group. In a hypothetical scenario where two employees engage in private communication which is neither offensive, nor unwelcome, there is no rule violation, even if the communication seems inappropriate or even outrageous to an outsider.

It is noteworthy that Mr. Lueth did not testify in this case. This fact is held against the employer to the following extent. Mr. Lueth complained about the claimant's August 23, 2012 conduct.

There is no testimony in this record, however, that he was offended by the claimant's conduct other than the fact that he made a complaint. The testimony of claimant's witnesses corroborated that Mr. Lueth made a comment right after he snapped the photograph on his phone that this was going "to be his payday" or that he was "going to get paid." The evidence also established that Mr. Lueth did not appear offended and laughed about it. In fact, he went on break with claimant later the same day. The evidence in the record established that Mr. Lueth himself previously engaged in inappropriate banter of a racial nature with the claimant and others, including consistently calling the claimant "Cracker Bob." The absence of any testimony from him is significant.

While Mr. Lueth did not testify, two of claimant's co-employees did testify. Justin Nelson and Timothy Whitaker both testified on claimant's behalf. Based upon the claimant's testimony, the testimony of his witnesses and the absence of evidence from Mr. Lueth, this fact pattern reasonably could lead to the following conclusions. The claimant and Mr. Lueth were friends who regularly engaged in inappropriate banter and teasing which sometimes involved racially charged comments. On August 23, 2012, the claimant made a "joke" using a piece of packing Styrofoam to give himself the appearance of a Klansmen performing a Nazi salute. The "joke" was over-the-top and while Mr. Lueth may not have been offended by it, he snapped a photo of it because he believed he could somehow use the situation to his advantage in the future. The claimant had no intent to be hurtful or hateful toward Mr. Lueth.

Even assuming all of these facts to be true, the evidence in the record still demonstrates work-related misconduct by a preponderance of evidence for the following reasons. First, the claimant was acutely aware that his job was in peril. He had been given a final warning in August 2010.[1] By the terms of the warning, the claimant was aware that any further violations of any company rules could result in his immediate discharge. The claimant was certainly on notice that his job was in jeopardy if he made bad decisions. He then made a very bad decision on August 23, 2012. He made a bad "joke" in poor taste in front of everyone on the shop floor.

The claimant's credibility problem is significant here as it relates to his culpability. The fact that the claimant stated during the investigation and again while under oath, that he was not intending to give the appearance of a Klansmen performing a Nazi salute, demonstrates that he knew his joke was objectively inappropriate in any employment setting. If this is true, why would the claimant allow his photograph to be taken? It is certainly unusual that the claimant posed for this photograph under these circumstances. He must have believed that Mr. Lueth would not be offended by the gag or he would not have posed for the photo. More importantly he must have expected this "joke" would not be reported. Once the incident was reported, however, claimant's effort to cover up his actions demonstrates that he knew that his actions could lead to his termination at the time he engaged in the conduct. A co-worker had also warned him that he was going to get into trouble engaging in this type of behavior. The bottom line is the claimant knew it was a bad joke that could get him in trouble and he did it anyway.

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[1] The claimant was terminated in 2010 for conduct completely unrelated to the current act of misconduct. As a result of Union grievance proceedings, the claimant was reinstated at work with no back pay and placed on what the company referred to as a "last chance agreement." This agreement stated specifically that if the employer found it necessary to discipline claimant, he could be discharged without any recourse through his collective bargaining agreement (CBA). This agreement is binding for purposes of labor-management relations. For purposes of the Employment Security Act under Chapter 96, this agreement amounts to nothing more than a final warning. In other words, the claimant certainly had a heightened awareness that his job was in jeopardy if he violated any company rules but the employer is clearly still required to demonstrate that the final act which resulted in discharge amounted to a current act of misconduct under Iowa law.

Third, and probably most important, the claimant was not engaged in private behavior behind closed doors with a friend. The claimant made this "joke" on the shop floor in front of numerous other co-workers. While the racial, ethnic and religious makeup of these individuals is not in the record, it is absurd to even ask whether any who witnessed the incident could have been offended. The "joke" was universally inappropriate to engage in within any modern workplace, particularly in front of co-workers who have not expressed consent for engaging in such off color humor. If this were a situation where the claimant and a friend were making inherently discriminatory or hostile jokes in a private setting and the claimant simply went too far, the outcome might be different. The claimant, however, made his "joke" in front of numerous co-workers without regard for who might be offended, hurt or adversely affected.

For these reasons, it is found that the claimant committed work-related misconduct and is not entitled to benefits. It is noted, however, that this is a terribly unfortunate circumstance. Claimant was an excellent worker. There is no evidence that the claimant intended to be hurtful or hateful. He simply went too far with a very bad "joke." The law nevertheless requires disqualification.

DECISION:

The fact-finding decision dated September 21, 2012, reference 01, is reversed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible.

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Joseph L. Walsh
Administrative Law Judge

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Decision Dated and Mailed

jlw/pjs