

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JERMAINE JOHNSON
Claimant

APPEAL NO. 07A-UI-06962-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

NCS PEARSON INC
Employer

OC: 06/17/07 R: 03
Claimant: Respondent (2)

Section 96.5(2)a – Discharge for Misconduct
Section 96.3(7) – Recovery of Overpayments

STATEMENT OF THE CASE:

NCS Pearson, Inc. filed an appeal from a representative's decision dated July 5, 2007, reference 01, which held that no disqualification would be imposed regarding Jermaine Johnson's separation from employment. After due notice was issued, a hearing was held by telephone on August 1, 2007. Mr. Johnson participated personally and offered additional testimony from Linda Williams. The employer participated by Jerra Garcia, Human Resources Generalist.

ISSUE:

At issue in this matter is whether Mr. Johnson was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Johnson was employed by NCS Pearson, Inc. from March 12 until June 14, 2007. He was hired to work full time in the warehouse on a temporary basis. A final ending date for the job had not been determined as of the date Mr. Johnson was discharged.

Mr. Johnson was discharged for conduct the employer considered a violation of its sexual harassment policy. He was arguing with Linda Williams, his girlfriend and coworker, while the two were on the production floor on June 14. Mr. Johnson had nude pictures on his cell phone of the two engaging in sexual intercourse. He threatened to show the pictures to another coworker, Edwin Cruz. When Mr. Cruz indicated he wanted to see the pictures, Mr. Johnson showed them to him. Ms. Williams reported the matter to a supervisor. Mr. Cruz later apologized to Ms. Williams.

Mr. Johnson was made aware of the employer's sexual harassment policy during orientation at the time of hire. He was also provided the policy in writing. The policy prohibits conduct that

creates a hostile or offensive work environment. As a result of his conduct on June 14, 2007, Mr. Johnson was discharged.

Mr. Johnson filed a claim for job insurance benefits effective June 17, 2007. He has received a total of \$410.00 in benefits since filing his claim.

REASONING AND CONCLUSIONS OF LAW:

An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Mr. Johnson was discharged for violating the employer's sexual harassment policy. He intentionally showed nude pictures of a coworker to a third party. His own witness, Ms. Williams, confirmed that he had pictures on his phone of the two of them engaging in sex. She also confirmed that she observed him showing his phone to Mr. Cruz. Although Mr. Johnson denied the conduct, Mr. Cruz confirmed to the employer that he was shown the pictures. Ms. Williams testified that Mr. Cruz later apologized to her and she could think of no reason for him to apologize except for having looked at the nude pictures of her.

Since Mr. Johnson's conduct occurred during the course of an argument with Ms. Williams, the administrative law judge must assume his intent was to embarrass or humiliate her in front of a peer. Ms. Williams did not lose her right to the protection of the employer's policies simply because she was Mr. Johnson's girlfriend. Mr. Johnson knew or should have known that showing nude pictures at work, especially of another employee, was contrary to the standards the employer had the right to expect. For the reasons cited herein, it is concluded that substantial misconduct has been established by the evidence. Accordingly, benefits are denied.

Mr. Johnson has received benefits since filing his claim. Based on the decision herein, the benefits received now constitute an overpayment and must be repaid. Iowa Code section 96.3(7).

DECISION:

The representative's decision dated July 5, 2007, reference 01, is hereby reversed. Mr. Johnson was discharged for misconduct in connection with his employment. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly job insurance benefit amount, provided he satisfies all other conditions of eligibility. Mr. Johnson has been overpaid \$410.00 in job insurance benefits.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/css