

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**BERNADETTE M WALKER**  
Claimant

**APPEAL 16A-UI-05858-CL-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**HARVEYS BR MANAGEMENT CO INC**  
Employer

**OC: 12/13/15  
Claimant: Appellant (1)**

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Iowa Code § 96.5(2)a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the May 19, 2016, (reference 02) unemployment insurance decision that denied benefits based upon misconduct. The parties were properly notified about the hearing. A telephone hearing was held on June 10, 2016. Claimant participated. Employer participated through hotel services manager, Robyn Reber, and senior human resources generalist, Vicki Broussard, and was represented by Barb Hamilton. Employer's Exhibit 1 was received.

**ISSUE:**

Was the claimant discharged for disqualifying job-related misconduct?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer as a table games dealer on July 4, 2013. Claimant was terminated on November 6, 2015.

Employer has a policy prohibiting employees from sexually harassing a co-worker. The policy warns employees can be disciplined up to termination for violating the policy. Claimant was aware of the policy, as it was included in the employee handbook received upon commencement of employment.

On November 5, 2015, claimant approached a female, lesbian co-worker on the gaming floor. Customers were present. Although claimant had spoken to her co-worker before, they were not friends. Claimant stated, "Can I say something to you? I don't want you to think I'm mean because we're not really friends or talk ... every time I walk through the pit and see you I just want to smack your ass ... you have such a nice ass, I just want to slap it." Claimant also stated she is not bisexual or lesbian, but she had these conversations with her friends and wanted her co-worker to know she wanted to slap her ass.

The employee reported this to her supervisor, and it was eventually reported to human resources and higher management. Claimant was interviewed and wrote a statement admitting to telling her co-worker that she wanted to “slap her ass.” Employer reviewed the surveillance video of the gaming floor. Employer saw claimant make a gesture to her co-worker like she was going to slap her behind.

Employer terminated claimant’s employment the next day for violating its harassment policy.

Claimant had never been previously warned for similar conduct.

**REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep’t of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

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 Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

Claimant's actions were inappropriate and violated employer's policy prohibiting harassment. Claimant's actions were in deliberate disregard of employer's interest in maintaining a harassment-free workplace. This is misconduct even without prior warning.

**DECISION:**

The May 19, 2016, (reference 02) unemployment insurance decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as claimant is deemed eligible.

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Decision Dated and Mailed

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