

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JENNIFER K HOWARD
Claimant

SCHENKER, INC.
Employer

APPEAL 20A-UI-12817-DZ-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 07/12/20
Claimant: Appellant (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quit

STATEMENT OF THE CASE:

The claimant/appellant, Jennifer K Howard, filed an appeal from the October 5, 2020, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified of the hearing. A telephone hearing was held on December 9, 2020. The claimant participated and testified. The employer participated through Toni McColl hearing representative, Courtney Skay, human resources manager, and Candace Edwards, human resources generalist. Employer's Exhibit 1 was admitted into evidence. Official notice was taken of the administrative record.

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: The claimant began working for employer on May 5, 2020. The claimant worked as a full-time training lead. The claimant was separated from employment on July 13, 2020.

On July 6, 2020, the employer received a complaint from an employee alleging that the claimant, his training lead, had made inappropriate sexual comments to him on July 2, 2020 that made him uncomfortable. The employer's Harassment-Free Workplace Policy prohibits sexual harassment. The claimant acknowledged receiving, reviewing and understanding the policy on July 2, 2020. Per its policy, the employer investigated the complaint. The claimant voluntarily admitted, in writing, to the inappropriate sexual comments. The claimant also alleged that she made the inappropriate sexual comments because the complainant kept asking her about the topic. The claimant had not told the employer about the complainant's behavior until she learned of the complaint. The employer terminated the claimant's employment on July 13, 2020 for violating the employer's Harassment-Free Workplace Policy.

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 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job misconduct. *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). The Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). 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). 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).

The decision in this case rests, at least in part, upon the credibility of the parties. When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. IDHS*, 461 N.W.2d 603, 607 (Iowa App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14 (1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608. The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976).

Here, the employer conducted an investigation into the allegations made against claimant. The employer testified as to the findings of their investigation, which were based on written statement and verbal statement of the claimant and the written statement of the complainant who was not present for the hearing. While there were no eyewitnesses to the alleged harassment, the employer testified that they nevertheless found these statements credible. I also find these statements credible. The employer testified that they personally interviewed the complaining individual and found his statement credible.

The employer has an interest and duty in protecting the safety of all of its employees. Claimant's behavior was in violation of specific work rules and against commonly known acceptable standards of work behavior. The claimant acknowledged receiving, reviewing and understanding the policy on the same day she made the inappropriate sexual comments to the complainant. The claimant admitted to making the comments. This is disqualifying misconduct. Benefits must be denied.

DECISION:

The October 5, 2020, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are denied.



Daniel Zeno
Administrative Law Judge

December 23, 2020
Decision Dated and Mailed

dz/scn