

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

STEVEN W THOMAS
Claimant

WELLS ENTERPRISES INC
Employer

APPEAL 19A-UI-07806-AW-T
ADMINISTRATIVE LAW JUDGE
DECISION

OC: 09/08/19
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Claimant/appellant filed an appeal from the October 7, 2019 (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified of the hearing. A telephone hearing was held on October 25, 2019, at 11:00 a.m. Claimant participated. Employer participated through John Soete, Hearing Representative. Employer's witnesses included Stacey Rupe, Human Resources Service Center Representative, and Courtney Wilson, Human Resources Business Partner. No exhibits were admitted.

ISSUE:

Whether claimant's separation was a discharge due to disqualifying job-related misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time blender operator from February 23, 2015 until his employment with Wells Enterprises, Inc. ended on July 3, 2019. (Rupe Testimony)

Employer has a policy prohibiting unlawful or unwelcome harassment, sexual or otherwise. (Claimant Testimony) The policy defines harassment as unwelcome touching and includes pinching as an example. (Rupe Testimony) The policy is outlined in the employee handbook. (Rupe Testimony) Claimant received a copy of the handbook. (Claimant Testimony)

On June 28, 2019, employer became aware of an allegation that claimant had been pinching other employees' nipples for over a year. (Wilson Testimony) The employee alleged that claimant continued pinching him after he asked claimant to stop on multiple occasions. (Wilson Testimony) On June 30, 2019, employer discussed the allegation with claimant. (Wilson Testimony) During that conversation, claimant admitted to pinching his coworkers. (Wilson Testimony) On June 30, 2019, employer suspended claimant pending an investigation into the allegation. (Wilson Testimony) Employer's investigation revealed that claimant was not alone in this conduct and that two other employees were also involved to varying degrees. (Wilson Testimony)

On July 3, 2019, employer discharged claimant for violation of employer's harassment policy by continuing unwelcome contact with a coworker after being asked to stop. (Rupe Testimony; Wilson Testimony) Claimant had no prior warnings for unwelcome contact with a coworker. (Rupe Testimony) Employer disciplined the other two employees who were also pinching coworkers based upon their level of involvement; one was terminated and the other was issued a written warning. (Wilson Testimony)

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged for disqualifying, job-related misconduct. Benefits are denied.

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 disqualification shall continue 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:

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 of misconduct has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); *accord Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000). Further, 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).

Iowa Admin. Code r. 871-24.32(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 cannot be based on such past act or acts. The termination of employment must be based on a current act.

A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up

to or including discharge for the incident under its policy. 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).

Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

Claimant pinched a coworker's nipples. That coworker asked claimant to stop, which put claimant on notice that his touching was unwelcome. Claimant continued to pinch this coworker's nipples thereby violating employer's policy prohibiting unlawful or unwelcome harassment. Claimant's actions were a deliberate violation or disregard of standards of behavior employer had a right to expect of claimant. Claimant's continued pinching of his coworker's nipples after being asked multiple times to stop may even constitute criminal assault or harassment. See Iowa Code §§ 708.1 and 708.7. Claimant was discharged for a current act of disqualifying work-related misconduct. Benefits are denied.

DECISION:

The October 7, 2019 (reference 01) unemployment insurance decision is affirmed. Claimant was discharged for disqualifying, job-related misconduct. Benefits are denied until claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Adrienne C. Williamson
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Decision Dated and Mailed

acw/scn