

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

NANCY L HANSON
Claimant

THEISENS INC
Employer

APPEAL 19A-UI-00480-AW-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 12/16/18
Claimant: Appellant (1)**

Iowa Code § 96.5(2) – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32 – Discharge for Misconduct

STATEMENT OF THE CASE:

Nancy Hanson, Claimant, filed an appeal from the January 11, 2019 (reference 01) unemployment insurance decision that denied benefits because she was discharged from work with Theisens, Inc. due to violation of a known company rule. The parties were properly notified of the hearing. A telephone hearing was held on February 1, 2019 at 11:00 a.m. Claimant participated. Employer participated through Heidi Bergfeld, Human Resources Generalist. Employer's Exhibits 1 – 5 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 full-time as a cashier from October 11, 2013 until her employment with Theisens, Inc. ended on December 21, 2018. (Bergfeld Testimony) Claimant's direct supervisor was Jim Lincoln, Store Manager. (Bergfeld Testimony)

Employer's harassment policy prohibits employees from unlawfully harassing any associate or other person in the course of employment; in general, harassment includes ethnic or racial slurs, jokes and other verbal or physical conduct relating to age, sex, race, color, creed, national origin, religion, pregnancy, disability, sexual orientation or any other basis of discrimination under law. (Bergfeld Testimony; Exhibit 2) The policy is in the employee handbook. (Bergfeld Testimony) The employee handbook also states that violation of the harassment policy may result in discipline up to and including termination. (Bergfeld Testimony) Claimant acknowledged that the handbook was located on the company's intranet and it was her responsibility to review and follow the policies therein. (Exhibit 1)

On December 16, 2018, claimant made derogatory comments to two customers' about their race and national origin. (Bergfeld Testimony; Exhibit 5) The customers reported the incident to employer on December 17, 2018 via employer's website. (Bergfeld Testimony; Exhibit 5) When claimant returned to work on December 21, 2018, employer discussed the incident with claimant. (Bergfeld Testimony) Claimant admitted to making the statements but alleged that the customers were laughing about it. (Bergfeld Testimony; Exhibit 4) Employer terminated claimant's employment on December 21, 2018 for violation of the harassment policy. (Bergfeld Testimony)

On August 10, 2016, claimant received a counseling report for improper conduct for asking a coworker about her sexual orientation. (Bergfeld Testimony; Exhibit 3) The counseling report states that claimant's conduct could be considered harassment and will not be tolerated. (Exhibit 3) The report also states that any future occurrences will lead to further disciplinary action up to and including termination. (Exhibit 3)

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the 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(4) provides:

(4) Report required. The claimant's statement and 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.

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).

It is the duty of the administrative law judge, as the trier of fact, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other evidence you believe; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

The findings of fact show how I have resolved the disputed factual issues in this case. I assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using my own common sense and experience. I find the employer's version of events to be more credible than the claimant's version of those events.

Claimant made comments to a customer that were not only a violation of a known company policy, but were a deliberate and substantial violation or disregard of the standards of behavior which the employer had a right to expect of her. Claimant had been warned for similar conduct in the past. Claimant knew or should have known that another violation of the harassment policy may result in her termination. Claimant's derogatory comments to customers about their race and national origin are disqualifying work-related misconduct. Benefits are denied.

DECISION:

The January 11, 2019 (reference 01) unemployment insurance decision is affirmed. Benefits are denied until such time as the claimant works in and has been paid wages for insured work equal to ten times claimant's weekly benefit amount.

Adrienne C. Williamson
Administrative Law Judge
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Decision Dated and Mailed

acw/rvs