

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**MIKE E CLINE**  
Claimant

**BENDER FOUNDRY SERVICE INC**  
Employer

**APPEAL 21A-UI-03660-S2-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 11/01/20**  
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the January 14, 2021, (reference 01) unemployment insurance decision that denied benefits based upon a finding that claimant was discharged for violation of a known company rule. The parties were properly notified of the hearing. A telephone hearing was held on March 17, 2021. The claimant Mike E. Cline participated and testified. The employer Bender Foundry Service, Inc. participated through vice president of operations Amy Stewart. Employer's Exhibits 1-8 were admitted.

**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 was employed full time as a shop supervisor from July 28, 2017, until October 16, 2020, when he was discharged.

Employer maintains a standards of conduct policy which prohibits workplace harassment. The standards are found in the employee handbook which employees receive upon hire. The policies are also reviewed during training sessions. (Exhibits 1, 2, 4) Claimant was aware of the harassment policy.

On October 13, 2020, claimant was working on a machine and needed to pass by an employee in a narrow aisle. Claimant placed his hand on the employee's lower back and said, "excuse me" and walked past her. The employee complained to employer that claimant touched her buttock with his hand. Employer investigated the incident, and as part of its investigation viewed video surveillance. The video showed the female employee from the waist up. The video did not show claimant place his hand above her waist when he passed by her, so employer determined claimant touched her below the waist. Claimant received a three-day suspension for violating employer's standards of conduct/harassment policy for inappropriate touching. (Exhibit 7) The suspension letter warned claimant that further complaints from employees would result in immediate termination.

On October 16, 2020, employer terminated claimant's employment for the October 13, 2020 incident. (Exhibit 6)

On August 28, 2018, a female employee accused claimant of licking his lips at her and making a comment about her taking her clothes off while she tightened her belt. Employer investigated the allegation but was unable to confirm it. A note on the allegation was added to claimant's file but he did not receive any disciplinary action.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

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).

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.

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). 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). 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).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. 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.

An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning. Here, no actual discipline had been given to claimant regarding any previous physical touching or other harassment. While an allegation was made against claimant two years prior to the October incident that claimant made inappropriate comments to an employee, employer testified that the allegation was investigated and unfounded, so claimant received no warning regarding his conduct until the October 13, 2020, suspension.

Iowa Admin. Code r. 871-24.32(8) provides:

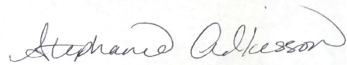
(8) *Past acts of misconduct.* While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The purpose of this rule is to assure that an employer does not save up acts of misconduct and spring them on an employee when an independent desire to terminate arises. For example, an employer may not convert a suspension into a termination for misconduct by relying on past acts. *Milligan v. EAB*, 802 N.W.2d 238 (Table)(Iowa App. June 15, 2011). This is exactly what was done in this case.

Here, employer administered a suspension to claimant on October 13, 2020 for inappropriate physical contact with an employee. The suspension letter stated that any further complaints from employees would result in immediate termination. Employer then discharged claimant on October 16, 2020, while he was suspended for the exact same reason. No act occurred between October 13, 2020 and October 16, 2020. No credible testimony was provided as to any additional information or documentation that was discovered by employer between October 13, 2020 and October 16, 2020 that would have led the employer to determine claimant engaged in any other type of job-related misconduct other than what he was previously suspended for on October 13, 2020. As such, employer has failed to meet its burden of proof in establishing a current act of disqualifying job-related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

**DECISION:**

The January 14, 2021, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.



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Stephanie Adkisson  
Administrative Law Judge  
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March 23, 2021  
Decision Dated and Mailed

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