

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

CHRISTOPHER B KOLLE
Claimant

AREA RESIDENTIAL CARE INC
Employer

APPEAL NO. 16A-UI-09051-B2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 07/24/16
Claimant: Appellant (1)**

Iowa Code § 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated August 11, 2016, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on September 7, 2016. Claimant participated personally. Employer participated by Jon Romaine, Kristina Johanns, and Susan Freeman.

ISSUE:

The issue in this matter is whether claimant was discharged for misconduct?

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant last worked for employer on July 25, 2016. Employer discharged claimant on July 25, 2016 because claimant made repeated comments with sexual connotations to his underling in the human resources department.

Claimant was hired on or around April 18, 2016 as human resources director for employer. At the time of his hire, claimant received an employee's handbook which contained information concerning sexual harassment. On May 4, 2016 claimant was in a room with his human resources generalist and an intern when claimant picked up a package of ground beef for the company potluck. The intern offered to carry the package for claimant and she declined his offer. Claimant then commented to his generalist stating, "We all know how much you really like to hold your meat." As the generalist went on maternity leave a day later, she never did bring this up to anyone else in management.

When the human resources generalist returned to work, her office had accumulated documents and information for ten weeks. Claimant, the generalist, and the intern were organizing the office. The generalist bent over her desk to start a copier. Claimant stated to her, "If you were my wife at home, your ass would have been slapped so hard!" Claimant explained that he was not sexually harassing claimant, but rather just sharing how he and his wife behave while at

home. Claimant went to upper management later in the day with her complaints of claimant's inappropriate behavior. Within the next couple of days employer interviewed the victim, the intern and claimant and obtained written versions of each person's story. (Those written versions were not forwarded to the administrative law judge.)

Employer decided to terminate claimant based on his multiple violations of the sexual harassment policy claimant received. Employer stated that it was surprising that the human resources director would act in such a manner. Employer did not issue a warning to claimant prior to his termination.

REASONING AND CONCLUSIONS OF LAW:

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).

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.

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982), Iowa Code § 96.5-2-a.

In order to establish misconduct as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. Rule 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa Ct. App. 1986). The conduct must show a 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 the employee's duties and obligations to the employer. Rule 871 IAC 24.32(1)a; *Huntoon supra*; *Henry supra*.

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The incidents in this matter were certainly inappropriate, and made all the more inappropriate that they were stated by the human resources director. Rather than providing guidance as to those actions which would not be allowed, claimant was the purveyor of exactly the types of comments that a human resources director would be admonishing workers for making. Claimant was also making the inappropriate comments to a support staff member both immediately before and after the woman had been on maternity leave.

Claimant's argument that he was not being sexually suggestive certainly fails in regards to the first comments – those related to the generalist's handling of meat. In regards to the second ass-slapping comment, although claimant was relating it to his home, he was speaking to a coworker who was bended over and talking how hard her derriere would be slapped if she were his wife at home. These statements were intentional, and certainly showed a disregard for employer' interests.

In this matter, the evidence established that claimant was discharged for an act of misconduct when claimant violated employer's policy concerning sexual harassment. The last incident, which brought about the discharge, constitutes misconduct because claimant knew or should have known the comments were inappropriate and unappreciated. The administrative law judge holds that claimant was discharged for an act of misconduct and, as such, is disqualified for the receipt of unemployment insurance benefits.

DECISION:

The decision of the representative dated August 11, 2016, reference 01, is affirmed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible.

Blair A. Bennett
Administrative Law Judge

Decision Dated and Mailed

bab/pjs