

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

BRIAN S STOVIE
Claimant

HARVEYS IOWA MANAGEMENT CO INC
Employer

APPEAL 16A-UI-05490-NM-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 04/17/16
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the May 5, 2016 (reference 01) unemployment insurance decision that denied benefits based upon his discharge for violation of a known company rule. The parties were properly notified of the hearing. A telephone hearing was held on May 31, 2016. The claimant, Brian Stovie, participated and testified. The employer, Harveys Iowa Management Company, Inc., participated through hearing representative Caroline Semer, human resource generalist Katrina Jones, and assistant restaurant and beverage manager Chad Luna. Employer's Exhibits One and Two were received into evidence.

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 restaurant team leader from September 5, 2012 until this employment ended on March 23, 2016, when he was discharged.

On March 16, 2016, some customers approached claimant and asked if he knew where they could buy some condoms. Claimant suggested they try the gift shop but joked that if they did not have any he had one in his wallet. The customers challenged claimant on whether this was true, so he pulled out his wallet. Claimant did not actually pull anything out of his wallet but placed it back in his pocket. Claimant testified these customers had been identified as very important customers and part of his job was making sure they were happy. According to claimant, the customers appeared to enjoy and appreciate his joking and the interaction. Claimant did not believe any other employees or customers witnessed the interaction. Later that day Jones learned of the situation when it was reported to her by two employees. Jones immediately began to investigation. The investigation included taking statements from the two employees who reported the incident, from the manager on duty, and the claimant, as well as viewing surveillance footage.

Earlier in the day, Jones had a conversation with claimant regarding an incident that occurred on March 5, 2016. On that day, it was alleged that claimant accompanied a female employee into the restroom to address an issue with her hair. Claimant testified he walked the employee to the restroom, which was unisex, so she could see that her hair was not properly done but did

not accompany her into the restroom. Jones informed claimant that if the allegations were true, such conduct would be highly inappropriate and that she would have to meet with the managers to discuss discipline. Jones did not have the opportunity to discuss this situation with managers prior to claimant's termination. In addition to this, claimant had also received multiple warnings for unrelated policy violations.

Following her investigation Jones met with the vice president of human resources and operations manager. It was determined that claimant's conduct violated the employer's policies regarding professionalism and appropriate guest interactions. Claimant testified he did not believe his behavior violated any policy and he was just doing what he needed to in order to make the guests happy. Nevertheless, the decision was made to terminate claimant's employment. This decision was made based on the current incident and the March 5 incident, as well as claimant's prior, unrelated, disciplinary history.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

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).

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). 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).

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.

The conduct for which claimant was discharged was an isolated incident of poor judgment. While claimant's conduct was in poor taste, 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 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. While the employer had previously warned claimant about other policy violations, there is no evidence to indicate he received prior discipline for a situation similar to this. Though an informal conversation was held with claimant on March 16 regarding possibly inappropriate conduct with another employee, the employer has not provided sufficient evidence that claimant was warned about the policies or issue that led to the separation with enough specificity to put him on notice that his conduct later that day may jeopardize his job. Inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning.

DECISION:

The May 5, 2016 (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

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