

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

**DENNIS E BARBER**  
Claimant

**APPEAL NO. 11A-UI-15665-HT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**HY-VEE INC**  
Employer

**OC: 11/06/11**  
**Claimant: Respondent (2R)**

Section 96.5(2)a – Discharge

**STATEMENT OF THE CASE:**

The employer, Hy-Vee, filed an appeal from a decision dated November 30, 2011, reference 01. The decision allowed benefits to the claimant, Dennis Barber. After due notice was issued, a hearing was held by telephone conference call on January 25, 2012. The claimant participated on his own behalf with Sharon Jackson, Dawn Anderson and was represented by Amiee Campbell. The employer participated by Whitney Davis, Mike Kuney, Virginia Pierce, Katie O'Conner, Melissa Bubon, Janet Bark, Debbie Smith, Sandra Schieffer and was represented by Corporate Cost Control in the person of Julia Day. Exhibit A was admitted into the record.

**ISSUE:**

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

**FINDINGS OF FACT:**

Dennis Barber was employed by Hy-Vee from June 10, 2002 until October 25, 2011 as a full-time frozen food manager. On October 20, 2011, an employee Virginia Pierce came to Mike Kuney with a complaint about Mr. Barber. A day or two before he was walking next to her and put his hand on her buttocks. Another employee, Randy Miller, witnessed it and asked her how she felt about the incident. She said it made her uncomfortable and he suggested she go to management and report it. The prior week the claimant had stood so close to her at the time clock he blocked her in to the point she was very uncomfortable and also brushed her buttocks as she moved around him.

During her interview Mr. Kuney asked her if she knew of anyone else who had had encounters with Mr. Barber and she named Melissa Bubon who was interviewed the next day. She complained about the same thing, the touching of her buttocks, feeling "trapped" in the stairwell when Mr. Barber would stretch both arms across the stairs, holding on to opposite handrails, and preventing her from continuing down the steps. She stated the claimant was always asking her how she was doing, staring at her and telling her she was "looking good." One time she was in the bakery and Mr. Barber was there. A bakery employee asked him if he needed anything and he said, "a date with her," indicating Ms. Bubon.

That interview led to an interview with Katie O'Conner who complained of the same thing, the claimant staring at her and telling her she was "looking good." The investigation led to Debbie Smith, Sandy Schieffer and Janet Bark. The complaints were similar but Ms. Bark had had an encounter with Mr. Barber in 2009 when she alleged he brushed his hand across her crotch on the stairwell. That day she confronted him in the cooler very decisively and bluntly telling him he was never to do anything like that again. He did not approach her after that.

Later that day Ms. Bark talked with Mr. Kuney about the incident but did not name Mr. Barber, only describing the incident and telling him what she had done and said about it. When interviewed in October 2011, she reminded the store director about the previous complaint and at that time named Mr. Barber as the person involved.

Ms. Schieffer's husband confronted Mr. Barber at the Christmas party in November 2010 and threatened him with physical harm if he every touched his wife again. Mr. Barber's wife stated, "it's not a big deal, Dennis is always touching the women at work."

After interviewing a few more people with similar stories Mr. Kuney contacted the corporate attorney and sent him the notes from the interviews. The recommendation was to discharge the claimant immediately.

Mr. Kuney met with Mr. Barber on October 25, 2011, and talked to him for over half an hour about all the specific allegations made, although he did not identify complainants. The claimant denied all the allegations and kept insisting he was just "very friendly and outgoing" and never did anything intentionally. He was discharged at the end of the meeting.

Dennis Barber has received unemployment benefits since filing a claim with an effective date of November 6, 2011.

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

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.

The claimant was aware of the employer's policy regarding sexual harassment and that it could lead to discipline "up to and including" discharge. His defense was consistently that he was just very friendly and any inappropriate touching was accidental. But that does not explain why he was close enough so many times to "accidentally" brush the buttocks of several women.

While it is not disputed some of the employee areas of the store are small, and all of the complainants acknowledged inadvertent touching does occur, but none of them had anyone else ever put hands on their buttocks. In addition, it is evident the claimant was guilty of more than just an "accidental" touching. When Mr. Miller observed the incident between Ms. Pierce and Mr. Barber, even he could tell it was more than an inadvertent touch and was concerned enough about it to approach Ms. Pierce and suggest she go to management about it.

Mr. Barber's defense also included an allegation he was discharged because of his work performance and the employer acknowledged that warnings had been issued about the subject. Mr. Kuney decisively denied that work performance had anything to do with the decision to discharge. Mr. Barber did not explain how or why six women would conspire to make up allegations of sexual harassment against him in order to assist the management in firing him. If that had been the women's intent, Ms. Bark could have made a specific complaint about him two years previously which would possibly have resulted in his discharge then. The judge finds no credibility in the assertion Mr. Barber was fired because of poor work performance.

The claimant's defense of being merely "very friendly" is not all that convincing in light of the fact Ms. Bark had been very straightforward with him about the inappropriateness of his conduct and Ms. Schieffer's husband had also very forcefully brought it to his attention that his conduct was unacceptable. These two incidents alone should have informed a reasonable person that his conduct needed substantial and immediate modification. But he continued to "invade the space" of his coworkers, touch them, stare at them and make personal remarks to the point it created a hostile work environment.

The employer has the obligation to provide a safe and harassment-free work environment for all employees and the claimant's conduct interfered with its ability to do so. This is conduct not in the best interests of the employer and the claimant is disqualified.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

- a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from

any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

The claimant has received unemployment benefits to which he is not entitled. The question of whether the claimant must repay these benefits is remanded to the UIS division.

**DECISION:**

The representative's decision of November 30, 2011, reference 01, is reversed. Dennis Barber is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount in insured work, provided he is otherwise eligible. The issue of whether the claimant must repay the unemployment benefits is remanded to UIS division for determination.

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Bonny G. Hendricksmeier  
Administrative Law Judge

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Decision Dated and Mailed

bgh/css