

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

EDWARD FROST
Claimant

APPEAL NO: 11A-UI-13391-E

**ADMINISTRATIVE LAW JUDGE
DECISION**

WESLEY RETIREMENT SERVICES INC
Employer

OC: 09-11-11
Claimant: Respondent (2-R)

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the October 3, 2011, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held in Des Moines, Iowa, before Administrative Law Judge Julie Elder on November 28, 2011. The claimant participated in the hearing. Betty Stone, human resources director; Melissa Elder, director of senior nutrition services; Lisa Rokey, referral intake coordinator; and Chris Butters, executive director, participated in the hearing on behalf of the employer. Employer's Exhibits One through Three were admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a part-time meals on wheels delivery driver for Wesley Retirement Services from April 15, 2010 to September 13, 2011. During the late afternoon of September 9, 2011, Human Resources Director Betty Stone was notified by Director of Senior Nutritional Services Melissa Elder that a co-worker told her the claimant made sexually derogatory comments about Ms. Elder to at least two co-workers in the office. September 9, 2011, was the Friday before the Iowa vs. Iowa State football game, and employees were allowed to dress in the attire and colors of their favorite team. The claimant put his arm around the shoulders of Care Coordinator of Home Care Aides Jennifer King, and asked her if she knew "where turtle skirt was." Ms. King indicated she did not know who he was talking about. The claimant gestured toward Ms. Elder's office and said that the "reason I call her turtle skirt is because her skirts are so short and tight I keep waiting to see her snapper" (Employer's Exhibit One). Referral Intake Coordinator Lisa Rokey was in the kitchen area on the same day and the claimant came in, leaned close to Ms. Rokey, and asked her if she knew what the claimant called Ms. Elder when she wears "those outfits." The claimant then said, "I call them her snapper trappers." Ms. Rokey gave a nervous laugh before stating, "Don't say that about Melissa," and returned to her office.

Ms. Stone and Executive Director Chris Butters began an investigation into the incident Monday, September 12, 2011, and interviewed six or seven employees who were in a position to overhear the claimant's comments about Ms. Elder, and all confirmed essentially the same facts. Ms. King had also repeated the story throughout the office and was disciplined for her role in the incident. Ms. Rokey told Ms. Stone and Mr. Butters about what the claimant said to her and another employee stated the claimant approached her and said, "You know why I call her turtle, don't you?" and the other employee turned and walked away because she had already heard the story from Ms. King.

Ms. Elder was off work September 12, 2011, due to illness and was told about the employer's investigation upon reporting for work September 13, 2011. She was very distraught and after considering the situation Ms. Elder concluded she could not continue in a working relationship with the claimant. When the claimant returned from his deliveries September 13, 2011, the employer met with him and he acknowledged making statements about calling Ms. Elder "turtle" and saying he could see her "snapper." The claimant stated he thought the statements were funny. Ms. Elder was "devastated" by the claimant's statements about her and the way she dressed; and because so many people were involved, she felt humiliated and stressed about whether she could even continue working for the employer. She felt betrayed by the claimant because they had a friendly relationship in the past. The claimant's comments made Ms. Elder question the way she dressed, looked, and acted.

The claimant testified he understands what sexual harassment is and was aware of the employer's policy regarding that issue and felt Ms. Elder effectively "deserved it" because of the way she dressed. The employer's harassment policy states, "Harassment is defined as unwelcome conduct which interferes with work performance or creates an intimidating, hostile or offensive work environment. Harassment can occur between team members at all levels of the organization and is not limited to leaders" (Employer's Exhibits Two and Three). Sexual harassment or offensive conduct in the workplace "includes but is not limited to...Verbal harassment of a sexual nature, such as lewd comments, sexual jokes or references, and offensive personal references; Demeaning, insulting, intimidating, or sexually suggestive comments about an individual" (Employer's Exhibit Three). The employer's Standards of Conduct state, "As a member of the WesleyLife team, you are expected to maintain a professional and courteous working relationship with clients, residents, visitors and your fellow team members...WesleyLife expects the following behavior from all team members: Words and actions that show respect for each other, including team members..." (Employer's Exhibit Two). The employer terminated the claimant's employment September 13, 2011, for violating its sexual and verbal harassment policy. The claimant told the employer he did not believe he was being discharged for sexual harassment but instead thought his employment was being terminated because he supported Iowa in the football game and Mr. Butters supported Iowa State and the claimant had made joking comments about the Cyclones.

The claimant has claimed and received unemployment insurance benefits since his separation from this employer.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job misconduct.

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 employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). While the claimant testified he understands the definition of sexual harassment and was aware of the employer's policy regarding sexual harassment and offensive conduct, his behavior belies that assertion. He told at least two of Ms. Elder's co-workers he called her "turtle" because her skirts were so "short and tight" he thought he was going to see her "snapper." He effectively testified that because of her manner of dress, she "deserved" his inappropriate and insensitive comments and those of anyone else as well. Rather than take responsibility for his words and actions, the claimant blames the victim, which is the textbook response of someone who sexually harasses or makes offensive comments to or about a co-worker. Under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits are denied.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not

received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code section 96.3-7. In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

DECISION:

The October 3, 2011, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/kjw