

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

GLEND A CORNELL
Claimant

APPEAL NO: 12A-UI-09932-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT PORK COMPANY
Employer

OC: 07/15/12
Claimant: Respondent (2/R)

Iowa Code § 96.5(2)(a) - Discharge for Misconduct
Iowa Code § 96.3-7 - Overpayment

STATEMENT OF THE CASE:

Swift Pork Company (employer) appealed an unemployment insurance decision dated August 9, 2012, reference 01, which held that Glenda Cornell (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 10, 2012. The claimant did not comply with the hearing notice instructions and did not call in to provide a telephone number at which she could be contacted, and therefore, did not participate. The employer participated through Javier Sanchez, Human Resources Assistant Manager. Employer's Exhibits One through Four were admitted into evidence. Based on the evidence, the arguments of the party, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

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

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was employed as a full-time production worker from November 1, 2010 through July 19, 2012 when she was discharged for inappropriate conduct. Numerous co-workers complained that the claimant grabbed herself or rubbed her breasts in front of co-workers. A co-worker reported that on one occasion, "Glenda stepped in front of Mohamed and opened her legs sideways while standing, and pointed her hand towards her female reproductive organ, Mohamed then placed his hand on such part of her body. Glenda's reaction was to laugh and laugh." This co-worker told the claimant her behavior was not good. The co-worker had also seen the claimant make sexual suggestions towards other male employees in several occasions.

A male co-employee complained about the claimant's behavior, "I myself think its sick and I'm disgusted that a woman is degrading herself just to get the other of (sic) men on the floor." He

reported that he has repeatedly seen the claimant, "...groping (sic) herself and fondling herself to the likes of other people. I have observed on various occasions where she has groped her breasts, bent over and make (sic) sexual gestures to other people."

The claimant did not participate in the hearing but provided a seven page statement to the employer in response to its investigation. The statement starts out claiming that she was sexually harassed. She said her male co-workers called her, "beautiful and sexy and calling me honey, sexy beautiful." The claimant talked about "the guys that kept on slapping my butt, grabbing boobs or twisting my nipples made me feel dirty!" She went on to report how she threw bleach in her bathtub. The claimant said that she went home at night, "wondering how I was going to get this to stop, so I thought, I know. I won't take a shower, and I can start getting fat, and not brushing my teeth. I thought if I was fat, ugly, smelly, that they might leave me alone, and it worked for some of them but some of them it didn't work!" The claimant provided other examples of co-workers grabbing her "boob" and said Bob, the vice-president of the union, "grabbed my nipple and twisted it..." She claimed that he has sexually harassed more women than just her and he was still there.

The claimant's letter went into numerous unrelated issues like how a pallet jack driver asked her to go to Mexico with him and he would pay for everything. She said she turned him down and everyone called her "chicken" for not going. The claimant said, "Why would I go to Mexico with some one (sic) who does not speak english (sic) at all and then get killed out there because they hate white people and never be seen again." She then pointed out that she was such a good employee and had saved the company by finding plastic pieces in the meat before it was sent out. The last part of her letter talked about how the co-employees harassed her because she was responsible for handing out gloves and could only give out two gloves per person. The claimant ended the letter by stating she was harassed, sexually harassed and mistreated.

The claimant filed a claim for unemployment insurance benefits effective July 15, 2012 and has received benefits after the separation from employment.

REASONING AND CONCLUSIONS OF LAW:

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

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 to prove the discharged employee is disqualified for benefits due to work-related misconduct. *Sallis v. Employment Appeal Bd.*, 437 N.W.2d 895, 896 (Iowa 1989). The claimant was discharged on July 19, 2012 for repeated inappropriate conduct. She did not participate in the hearing and the majority of the evidence was in the form of written statements, including one from the claimant. There were clear and concise statements from her co-employees alleging the claimant was grabbing herself and fondling her breasts. In contrast, the claimant's lengthy statement addresses a lot of information, only some of which is relevant to the reasons for termination. She claims more than once that co-workers, including the vice-president of the union, twisted her nipples, which is a pretty serious allegation. However, the claimant does not specifically state that she reported this assault to the employer or to the police or to anyone in particular. Overall, the claimant's statement just does not appear as credible as the statements provided by her co-workers. Consequently, the employer has met its burden. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

Iowa Code § 96.3(7) 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. The overpayment recovery law was updated in 2008. See Iowa Code § 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an

overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The unemployment insurance decision dated August 9, 2012, reference 01, is reversed. The claimant is not eligible to receive unemployment insurance benefits because she was discharged from work for misconduct. Benefits are withheld until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/pjs