

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JEFFERY C POTTER

Claimant

APPEAL NO: 12A-UI-00107-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

FISHER HYDRAULICS/A LIGON COMPANY

Employer

OC: 12/12/10

Claimant: Respondent (2-R)

Section 96.5-2-a – Discharge
871 IAC 24.32(1) – Definition of Misconduct
871 IAC 26.14(7) – Late Call
Section 96.3-7 – Recovery of Overpayment

STATEMENT OF THE CASE:

The employer appealed a department decision dated December 30, 2011, reference 05, that held claimant was not discharged for misconduct on November 4, 2011, and benefits are allowed. A telephone hearing was held on February 2, 2012. The claimant did not participate. Diane Harrison, HR Manager, participated for the employer. Employer Exhibit One was received as evidence.

ISSUES:

Whether the claimant was discharged for misconduct in connection with employment.

Whether claimant is overpaid unemployment benefits.

Whether claimant established a good cause to reopen the record.

FINDINGS OF FACT:

The administrative law judge having heard the testimony of the witnesses, and having considered the evidence in the record, finds: The claimant began employment on January 14, 2011, and last worked for the employer as a full-time shift supervisor on November 3, 2011. He received the employer policies in an employee handbook that included sexual harassment. It is defined as unwanted visual or physical conduct of a sexual nature.

The employer HR department received a lead person report on November 2nd that claimant had been exposing his genitals. The employer HR manager questioned the lead person who stated claimant had exposed himself on three occasions and he was getting tired of it. The first time he laughed it off, but then found the continuing conduct disturbing.

The manager interviewed co-workers who confirmed claimant had exposed himself in the lunchroom and out on the shop floor. When the employer manager confronted claimant on

November 3, he said that he had exposed himself, but it was done in a joking manner. The employer discharged claimant for violation of its sexual harassment policy.

Claimant has received unemployment benefits on his claim. Claimant was called twice at the phone number provided and the response was a recorded message. After the record was closed, claimant called UI Appeals. When claimant was called a third and fourth time he answered but acted as if he could not hear. He called UI Appeals a second time, was transferred to the ALJ and disconnected when he was asked to respond. He called UI Appeals again, was transferred to the ALJ who questioned about why he was not responding. Although he had no difficulty in speaking with UI appeals on his cell phone, he could not explain why he was not responding to the recorded messages and/or the ALJ calls other than phone connection issues. The ALJ had no phone communication problems.

REASONING AND CONCLUSIONS OF LAW:

871 IAC 26.14(7) provides:

(7) If a party has not responded to a notice of telephone hearing by providing the appeals section with the names and telephone numbers of its witnesses by the scheduled time of the hearing, the presiding officer may proceed with the hearing.

a. If an absent party responds to the hearing notice while the hearing is in progress, the presiding officer shall pause to admit the party, summarize the hearing to that point, administer the oath, and resume the hearing.

b. If a party responds to the notice of hearing after the record has been closed and any party which has participated is no longer on the telephone line, the presiding officer shall not take the evidence of the late party. Instead, the presiding officer shall inquire as to why the party was late in responding to the notice of hearing. For good cause shown, the presiding officer shall reopen the record and cause further notice of hearing to be issued to all parties of record. The record shall not be reopened if the presiding officer does not find good cause for the party's late response to the notice of hearing.

c. Failure to read or follow the instructions on the notice of hearing shall not constitute good cause for reopening the record.

At issue is a request to reopen the record made after the hearing had concluded. The request to reopen the record is denied because the party making the request failed to participate by reading and following the instructions on the hearing notice.

The administrative law judge concludes the claimant failed to establish a good cause to reopen the record. The claimant was advised that if he could establish from his cell phone provider that his phone could not receive a direct call then he could later request a re-hearing.

His cell phone was working to the point it activated voice messaging when called twice for the hearing, and claimant could not explain how the phone could receive the call(s), but his phone did not ring or alert him. His phone worked well enough to call and speak with UI Appeals, but when his first call was transferred, and the ALJ inquired, the call was disconnected. He later called UI Appeals and after the transfer, spoke with the ALJ about his failure to participate based on cell phone problems.

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.

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 administrative law judge concludes employer has established claimant was discharged for misconduct in connection with employment on November 3, 2011 for violation of the sexual harassment policy.

The employer investigated a lead person complaint that claimant had exposed his genitals on more than one occasion at the plant facility. Two co-workers corroborated the lead person report that confirmed the exposure that was not an isolated joking instance as alleged by claimant. The employer established claimant violated its sexual harassment policy that constitutes job disqualifying misconduct.

Iowa Code § 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.

Since claimant has been disqualified by this decision after receiving benefits, the overpayment issue is remanded to claims for a decision.

DECISION:

The department decision dated December 30, 2011, reference 05, is reversed. The claimant was discharged for misconduct on November 3, 2011. Benefits are denied until the claimant requalifies by working in and being paid wages for insured work equal to ten times his weekly benefit amount, provided the claimant is otherwise eligible. The overpayment issue is remanded.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/pjs