

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JON E MUSELMAN
Claimant

APPEAL NO. 06A-UI-11632-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OSCEOLA FOODS CORPORATION
Employer

**OC: 11/05/06 R: 03
Claimant: Appellant (1)**

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Jon Muselman (claimant) appealed a representative's November 28, 2006 decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits because he was discharged from work with Osceola Foods (employer) for violation of a known company rule. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on December 19, 2006. The claimant participated personally. The employer participated by Judy Callahan, Human Resources Manager; Alisha Crawford, Team Leader; and Priya Robinson, Quality Control Auditor.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was hired on September 11, 2000, as a full-time maintenance mechanic. The claimant signed for receipt of the company sexual harassment policy on September 11, 2000, and April 27, 2005. He watched a video regarding sexual harassment three months before the end of his employment. The employer issued the claimant written warnings on December 13, 2002, and January 24, and April 24, 2005, for inappropriate behavior or language. The employer warned the claimant that further incidents of sexual harassment would result in his termination from employment.

On October 26, 2006, the claimant's co-workers complained to the employer about the claimant's behavior. The employer investigated and found the claimant rubbed his penis through his pants, commented on the size and hardness of his penis and tried to solicit co-workers to have sex with him. The employer terminated the claimant on November 7, 2006, at the completion of its investigation.

The testimony of the employer and claimant was inconsistent. The administrative law judge finds the employer's testimony to be more credible. The claimant admits that he tried to get co-workers to touch his leg just below his groin.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for 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 proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The U.S. Supreme Court has held that a cause of action for sexual harassment may be predicated on two types of harassment: (1) Harassment that involves the conditioning of concrete employment benefits on sexual favors, and (2) harassment that, while not affecting economic benefits, creates a hostile or offensive working environment. Meritor Savings Bank v. Vinson, 477 U.S. 57, 62 (1986). In this case the claimant's actions and language created a hostile or offensive working environment.

The claimant used inappropriate language or acted inappropriately at least three times prior to his termination. The employer issued the claimant warnings for his actions and language. The claimant clearly disregarded the standards of behavior which an employer has a right to expect of its employees. The claimant's actions were volitional. When a claimant intentionally disregards the standards of behavior that the employer has a right to expect of its employees, the claimant's actions are misconduct. The claimant was discharged for misconduct.

DECISION:

The representative's November 28, 2006 decision (reference 01) is affirmed. The claimant is not eligible to receive unemployment insurance benefits, because he was discharged from work for misconduct. Benefits are withheld until he has worked in and has been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/kjw