

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ROBYN J HARMS
Claimant

ROBERTS BAYER LLC
Employer

APPEAL 21A-UI-01089-JC-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 03/15/20
Claimant: Appellant (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant/appellant, Robyn J. Harms, filed an appeal from the December 1, 2020 (reference 01) Iowa Workforce Development (“IWD”) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on February 15, 2021. The claimant participated personally. The employer, Roberts Bayer LLC., participated through Margaret Ortiz.

The administrative law judge took official notice of the administrative records. Employer Exhibits 1-4 were admitted. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Employer does business as a Massage Envy franchise. Claimant completed schooling to become a licensed massage therapist in September 2019.

Claimant was employed full-time as a licensed massage therapist beginning January 16, 2020 and was separated from employment on September 8, 2020, when she was discharged.

When claimant was hired, she was trained on employer procedures (Employer Exhibit 1). These included proper draping, the employer code of conduct and zero tolerance infractions. (Employer Exhibit 2). Employer policy states that the draping or covering of all body parts not being worked on at the time remain covered by strategically tucking in/covering the body parts with a sheet. Clients are to remain modestly draped and not exposed. This was consistent with claimant's schooling as well.

Employer' training also states that the drape or sheet is a non-verbal boundary and that a message therapist may not touch a client's body part that is under/covered by a sheet.

Claimant stated she was trained by her schooling that if she inadvertently grazed a covered body part to not call attention to it, as it could make a client uncomfortable. The employer stated its internal policy was to apologize immediately to ensure the client knew it was not purposeful and inadvertent.

Claimant was discharged based upon a single complaint based upon an August 30, 2020 massage. Claimant was given professional discretion within the employer's guidelines to assess a client's need and perform the appropriate techniques to address the need. The client reported to employer that claimant did not comply with the draping procedure while massaging pectoral muscles. According to the complaint, claimant's fingers/hands went under the draped sheet while massaging the client's pectoral muscles. The investigator reported the client was uncomfortable (Employer Exhibit 3). When interviewed, claimant acknowledged her technique for massaging pectoral muscles would include placing her hands under the draped sheet a few inches but denied coming into contact with the client's breast or placing her entire hands under the sheets as it related to the client complaint. Based upon the employer's investigation and zero-tolerance policy, claimant was discharged.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for a single incident of disqualifying misconduct.

Iowa unemployment insurance law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id.*

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job related misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The focus of the administrative code definition of misconduct is on deliberate, intentional or culpable acts by the employee. *Id.*

In this case, claimant was discharged based upon a single incident of violating the employer's draping/barrier policy. Disqualification for a single misconduct incident must be a deliberate violation or disregard of standards of behavior which employer has a right to expect. *Diggs v. Emp't Appeal Bd.*, 478 N.W.2d 432 (Iowa Ct. App. 1991). Upon carefully reviewing the evidence presented, which included portions of the employer's policies and investigation report, Ms. Ortiz's testimony and claimant's testimony, the administrative law judge concludes that while claimant may not have intentionally deliberately grazed or touched a body part draped by the sheet, but she did purposefully use a massage technique in which she would place her fingers or hands under a sheet. Claimant credibly testified that this was her preferred technique to massaging pectoral muscles. The purposeful placing of the fingertips or hands under the sheet to massage the client (even briefly) was a violation of the employer's known draping policy.

The question of whether the refusal to perform a specific task constitutes misconduct must be determined by evaluating both the reasonableness of the employer's request in light of all circumstances and the employee's reason for noncompliance. *Endicott v. Iowa Dep't of Job Serv.*, 367 N.W.2d 300 (Iowa Ct. App. 1985). In this case, the employer has implemented its draping policy for the safety of both its clients and employees. The claimant willfully employed a technique that was inconsistent with the employer's policy and expectation. Cognizant that claimant was a newly licensed massage therapist, the administrative law judge is persuaded the claimant had the resources available to ask the employer or her peers of massage technique options that would allow her to perform her job duties but that would not violate the employer's policy. The claimant has failed to establish sufficient evidence to mitigate her non-compliance with the employer's draping policy on August 30, 2020. The administrative law judge is persuaded the claimant knew or should have known her conduct was contrary to the best interests of the employer. Therefore, based on the evidence presented, the claimant was discharged for misconduct, even without prior warning. Benefits are denied.

DECISION:

The unemployment insurance decision dated December 1, 2020, (reference 01) is affirmed. The claimant was discharged for job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.



Jennifer L. Beckman
Administrative Law Judge
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February 26, 2021
Decision Dated and Mailed

jlb/scn

NOTE TO CLAIMANT:

This decision determines you are not eligible for regular unemployment insurance benefits. If you disagree with this decision you may file an appeal to the Employment Appeal Board by following the instructions on the first page of this decision.

If you do not qualify for regular unemployment insurance benefits due to disqualifying separations and are currently unemployed for reasons related to COVID-19, you may qualify for Pandemic Unemployment Assistance (PUA). **You will need to apply for PUA to determine your eligibility under the program.** More information about how to apply for PUA is available online at:

www.iowaworkforcedevelopment.gov/pua-information

You may find information about food, housing, and other resources at <https://covidrecoveryiowa.org/> or at <https://dhs.iowa.gov/node/3250>

Iowa Finance Authority also has additional resources at <https://www.iowafinance.com/about/covid-19-ifa-recovery-assistance/>