IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

SHELLY M DILLEY
Claimant

AYM INC
Employer

APPEAL NO. 17A-UI-07019-S1-T

ADMINISTRATIVE LAW JUDGE
AMENDED DECISION

OC: 06/18/17
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

A.Y.M (employer) appealed a representative's July 6, 2017, decision (reference 01) that concluded Shelly Dilley (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for July 28, 2017. The claimant was represented by Leonard Bates, Attorney at Law, and participated personally. The employer participated by Marlene Dobraska, Human Resources Representative, and David Schoenberger, Plant Manager. Exhibit D-1 was received into evidence. The claimant offered and Exhibits A, B, C, D, E, F, and G were received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

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 hired on January 4, 2017, as a full-time machine operator. The claimant signed for receipt of the employer's handbook on January 4, 2017. The employer has a progressive disciplinary policy. The normal steps of the policy are written warning, three-day suspension, and termination. The handbook states that employees should not disrespect co-workers but profanity was heard every day on the plant floor. The employer's sexual harassment policy states that complaints should be made to the offending party, human resources, or a member of management.

The claimant's regular supervisor was Dane and the industrial engineer was Chris. Chris functioned as the claimant's supervisor when Dane was absent. Chris came into the claimant's cell to fix problems with equipment. The claimant tried to have normal conversations but Chris often talked about personal issues. Through Facebook the claimant invited several co-workers out to see a band. Chris was one of the people she invited.

On May 6, 2017, Chris entered the claimant's cell to fix a tester. He asked the claimant if she was a "cougar" and what her age limit was for a boyfriend. The claimant indicated she was not interested him. Later he came up behind her and poked his fingers in her sides in a tickling fashion. Chris stood over the claimant, looking at her. The claimant asked what he was doing. He said he was checking out her parts. He then looked at her rear end and chest. The claimant said, "No you are not". Chris said, "You can't prove it. It's your word against mine". Later he said, "I think you need to get laid. I wasn't talking about you. I was talking about me." The claimant said "oh well" about three times. Then Chris screamed at her and found problems with the claimant's performance. Dan came to the claimant's cell and said they would deal with the issues on Monday, May 8, 2017. After May 6, 2017, Chris treated the claimant poorly. On May 10, 2017, the employer issued the claimant a written warning for carelessness in her performance. The employer notified the claimant that further infractions could result in termination from employment.

On May 23, 2017, the claimant had a talk with the human resources representative about the way Chris yelled at her. She told her that Chris yelled at her when she asked if a co-worker would be at work. Chris said that it was "none of her fucking business". The human resources representative did not think this was a complaint. She thought they were just having a talk.

On June 6, 2017, Chris was in the claimant's cell fixing a machine. After he fixed it he accused the claimant of arguing. The supervisor knew the claimant was not arguing and ordered Chris out of the claimant's cell. Chris continued to argue and told the claimant she was going to the office. The claimant told Chris the workplace was not his personal dating pool and the employer was going to hear about the sexual harassment. The two exchanged words and the claimant called Chris a "motherfucker". The employer interviewed Chris and the claimant.

The claimant told the employer about Chris' sexual conduct and conversations with her and how they were unwanted. The employer questioned many employees with whom the claimant worked. The employees approached the claimant. The claimant told them that she and Chris did not play well together and only to say the truth to the employer. On June 7, 2017, the employer questioned the claimant more. The employer told the claimant that Chris was her co-worker and not a member of management. The employer asked the claimant to write a statement about what happened.

The claimant turned in her statement on June 9, 2017, and kept working through June 14, 2017. On June 14, 2017, the employer issued the claimant a six month review with an overall rating that said she met expectations. On June 15, 2017, the claimant called in sick with bronchitis. On June 18, 2017, the employer terminated the claimant. The employer told the claimant she was terminated because they did not believe her sexual harassment complaint. The termination document indicates the claimant was terminated for "attempting to undermine a member of managements authority and making serious false accusations in an attempt to defame his character." Other violations include disrespect, vulgar language, contradicting a supervisor, and being out of her work area.

The claimant filed for unemployment insurance benefits with an effective date of June 18, 2017. The employer participated personally at the fact finding interview on July 5, 2017, by Marlene Dobraska.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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 disqualification shall continue 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.

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 misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). 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 Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). Basically, the claimant filed a complaint of sexual harassment with the proper people. The employer conducted an investigation and found the complaint to be unfounded. As a result, the employer terminated the claimant because the employer said the complaint was unfounded. The employer's policy does not state that an employee should be terminated if the complaint is determined to be unfounded. If this were the case, it would have a chilling effect on the filing of complaints and sexual harassment would go unreported.

The employer mentioned defamation of character in the claimant's termination. The employer did not provide sufficient evidence to prove the claimant defamed the character of Chris. Lastly, the employer allows profanity on the job site. The employer terminated the claimant for conduct that every other employee is allowed to exhibit daily. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's July 6, 2017, decision (reference 01) is affirmed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/rvs