

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**ROBERT A BUCKLES**  
Claimant

**APPEAL NO. 17A-UI-06242-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**HY-VEE INC**  
Employer

**OC: 05/14/17**  
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

Robert Buckles filed a timely appeal from the June 15, 2017, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on the claims deputy's conclusion that Mr. Buckles was discharged on May 16, 2017 for conduct not in the best interest of the employer. After due notice was issued, a hearing was held on July 6, 2017. Mr. Buckles participated. James Tranfaglia of Corporate Cost Control represented the employer and presented testimony through Kay Kress and Staci Wahl. Exhibits 1 through 14 and 16 through 19 were received into evidence.

**ISSUE:**

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Robert Buckles was employed by the Hy-Vee in Fairfield as a full-time baker until May 16, 2017, when Kay Kress, Store Director, discharged him for "Conduct unbecoming of a HyVee Employee—inappropriate conversations with female employees." Mr. Buckles began his employment in 2015. At the time of hire, the employer provided Mr. Buckles with an employee handbook. The handbook contained a policy that prohibited harassment, including sexual harassment. The handbook definition of sexual harassment included verbal conduct of a sexual nature when, "The harassment substantially interferes with an employee's work performance or creates an intimidating, hostile, unpleasant or offensive work environment." The employer provided Mr. Buckles with an updated handbook in 2016, which handbook contained the same sexual harassment policy.

The final incident that triggered the discharge was a conversation between Mr. Buckles and Laura Franklin, the backup Accounting Coordinator at the Fairfield store. The conversation took place on May 13, 2017 at the end of Mr. Buckles' shift. Mr. Buckles went to Ms. Franklin's office door, ostensibly to ask her a question about a payroll deduction from his check. Mr. Buckles never got around to asking his question. Ms. Franklin said hello, asked Mr. Buckles how he was doing, and asked him if he had any weekend plans. Mr. Buckles stated that he did not generally have weekends or holidays off, but that when he did not have to work, he and his girlfriend liked

to party with friends. Mr. Buckles stated that he and his girlfriend are not shy about what they do and who they are. Mr. Buckles stated that he and his girlfriend would call "some nasty people" and have a party if he did not have to work. Mr. Buckles did not invite Ms. Franklin to join him and did not say anything explicitly sexual. Ms. Franklin erroneously inferred that Mr. Buckles' utterance was a sexual proposition. After the conversation, Ms. Franklin contacted Bakery Manager Curtis Goudy by text message to complain that Mr. Buckles had just propositioned her. Mr. Goudy was Mr. Buckles' immediate supervisor. Ms. Franklin and Mr. Goudy had previously been in a romantic relationship. Based on that prior relationship, Mr. Goudy told Ms. Franklin that she would need to direct her concern to Kay Kress, the Store Director, and Staci Wahl, the Human Resources Manager.

On May 14, 2017, Ms. Franklin sent the following email message to Ms. Kress and Ms. Wahl:

Yesterday I had an issue with Bob Buckles. He had just gotten off work and was standing in my office doorway so I said hello and asked if he any weekend plans with it being Mothers Day weekend. He said no, but he wanted to have a party with friends sometime when he didn't have to work. That escalated into him saying that he and his girlfriend are very open with what they do and who they are, and that if he didn't have to work, he'd call up some 'nasty people' and they'd have a party. He just kept repeating the part about he and his girlfriend not being shy about who they are. The situation made me very uncomfortable and feel like I was being propositioned. I've never had a problem with him before, but this was inappropriate for the workplace and I don't want anyone else to have to deal with it.

On May 15, Ms. Kress met with Ms. Franklin, who essentially repeated what she had put in her email to Ms. Kress.

On May 16, Ms. Kress and Ms. Wahl met with Mr. Buckles. Ms. Kress had tentatively decided to discharge Mr. Buckles from the employment, but first wanted to speak with him. Ms. Kress asked Mr. Buckles whether he had conversed with Ms. Franklin as he was leaving work the previous Saturday. Mr. Buckles acknowledged the conversation, but stated that he did not have a good recollection of the conversation. Ms. Kress shared some of the information contained in Ms. Franklin's email. Ms. Kress asked Mr. Buckles whether he had mentioned to Ms. Franklin that he and his girlfriend were open and wanted to call some nasty people. Mr. Buckles told Ms. Kress that he wanted to party and that he liked to relax during his down-time. Ms. Kress did not ask Mr. Buckles what he meant by the term "nasty people."

At the time Ms. Kress met with Mr. Buckles on May 16, she brought up an April 18, 2017 incident involving Mr. Buckles and a 17-year-old female school-to-work program participant who had been working in the bakery. On that day, Mr. Buckles had asked the young lady for a kiss before he left work that day. The young lady was upset by incident and spoke to Mr. Goudy immediately following the incident. Mr. Goudy promptly brought the young lady to the store office to report the incident to Ms. Wahl, Human Resources Manager. Ms. Wahl observed at the time that the young lady was visibly shaken. Following the meeting, the young lady's mother phoned the store to complain about the incident. The young lady did not return to Hy-Vee. Ms. Wahl spoke with Mr. Buckles on April 20 with Mr. Goudy present. Ms. Wahl told Mr. Buckles what the young lady had reported and asked Mr. Buckles whether the report was true. Mr. Buckles said he usually just jokes around does not mean anything by it and "did not mean anything by it." Mr. Buckles told Ms. Wahl that he did not recall asking the young lady for a kiss. Ms. Wahl told Mr. Buckles that people may take offense to the things he says and not to say anything that people could view as sexual in nature.

In connection with the April 18 incident, Ms. Wahl spoke to other bakery staff concerning comments of a sexual nature uttered in the bakery. Ms. Wahl learned from a female employee that comments of a sexual nature were part of the banter and joking amongst bakery

employees. The female employee indicated that she and Mr. Buckles each made such utterances. Ms. Wahl told the female employee that the comments needed to stop.

Though they were not a significant factor in the decision to discharge Mr. Buckles from the employment, the employer had earlier in the employment issued formal and informal reprimands to Mr. Buckles for various deficiencies in his performance of his bakery duties. The most recent such reprimand had been issued on March 21, 2017 regarding a production issue on March 17, 2017.

## **REASONING AND CONCLUSIONS OF LAW:**

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.

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 this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See *Lee v. Employment Appeal Board*, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether

the conduct that prompted the discharge constituted a “current act,” the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also *Greene v. EAB*, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See *Crosser v. Iowa Dept. of Public Safety*, 240 N.W.2d 682 (Iowa 1976).

The weight of the evidence in the record fails to establish a current act of misconduct in connection with the employment. The employer presented insufficient evidence, and insufficiently direct and satisfactory evidence, to establish, by a preponderance of the evidence, that Mr. Buckles uttered any comments of a sexual nature when speaking with Ms. Franklin on May 13, 2017. The employer had the ability to present testimony through Ms. Franklin, but elected not to present such testimony. The employer spoke with Mr. Buckles on May 16 concerning the May 13 conversation, but neglected to ask Mr. Buckles the obvious questions of what he meant by his May 13 reference to ‘nasty people’ or to being open about who he is and what he does. Mr. Buckles testified in essence that he what he meant was that his social circle includes people that some would deem unsavory characters. The employer presented insufficient evidence to rebut that assertion. The administrative law judge cannot follow the employer's lead, or shift the burden of proof to Mr. Buckles, by assuming that Mr. Buckles must have meant something sexual on May 13 because he had crossed the line on April 18.

Because the administrative law judge concludes that the evidence does not establish a current act of misconduct, the discharge from the employment does not disqualify Mr. Buckles for unemployment insurance benefits. In addition, because the evidence fails to establish a current act of misconduct, the administrative law judge need not further consider the April 18 incident or the sundry earlier performance issues. Mr. Buckles is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

**DECISION:**

The June 15, 2017, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs