

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

LERECO GEORGE
Claimant

RIVERSIDE PLASTICS, INC.
Employer

**CASE NO. 21IWDUI2079
IWD APPEAL NO. 21A-UI-07017**

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 10/18/20
Claimant: Appellant (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the March 4, 2021 (reference 01) unemployment insurance decision that disallowed benefits based upon claimant's discharge from employment. The parties were properly notified of the hearing. A telephone hearing was held on April 28, 2021. The claimant, Lereco George, participated personally. The employer, Riverside Plastics, was represented by attorney Gayla Harrison, and witnesses, Liz Thornberg, personnel director, and Derek Glaha, shift supervisor.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Did claimant voluntarily quit the employment with good cause attributable to employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed with the employer as a temporary employee from May 31, 2018 through May 17, 2019 and full-time from May 31, 2019 through October 23, 2020 when he was discharged. Claimant was a weigh-up person and his job duties included, among other things, collecting boxes and making sure boxes were labeled correctly for shipping. Derek Glaha was claimant's immediate supervisor.

This employer has a written harassment policy in place that states that "harassing conduct" both physical and verbal, including "offensive slurs, jokes, degrading comments . . . offensive sexual flirtation, advances, or propositions, continued or repeated abuse of a sexual nature" is prohibited. The policy indicates that the employer will conduct an investigation of harassment complaints and if the investigation confirms the allegations, "appropriate corrective action will be taken, and may include discharge." (Ex. 1). Claimant signed an acknowledgement of the policy when he received the employee handbook. (Ex. 2).

In 2019, claimant was made aware that there were complaints made about him sexually harassing female employees. He was given a verbal warning regarding his behavior. Claimant understood that his job was in jeopardy after the 2019 meeting in light of the employer's harassment policy.

The final incident leading to discharge occurred during October 2020. The employer had received numerous complaints regarding claimant sexually harassing female employees, including, but not limited to, tracing the side of a female coworker's body with his hand, rubbing the back of a female coworker, rubbing his body against the backside of a female coworker, stating that a female coworker's "butt looks good," and asking for unwanted hugs. (Ex. 4).

On October 21, 2020, the personnel director, Thornberg, and the plant manager, Roy Barrow, spoke to claimant about the complaints, informed him again about the harassment policy and stated that they were going to conduct an investigation. The employer's investigation indicated that the complaints against claimant were credible. On October 23, 2020, the employer met with the claimant. The complaints and witness statements regarding claimant's behavior were read to him. Claimant denied all the statements stating that all persons involved were lying. Claimant was discharged for violating the employer's policy on harassment.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for job-related misconduct. Benefits are denied.

As a preliminary matter, I find that the Claimant did not quit. Claimant was discharged from employment.

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).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

Iowa Admin. Code r.871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.* After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the Administrative Law Judge finds that testimony from Ms. Thornberg and Mr. Glaha is more credible than claimant's testimony.

The employer has the burden of proof in establishing disqualifying job 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.* When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct

unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). Further, poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). A lapse of 11 days from final act until discharge when claimant was notified on fourth day that his conduct was grounds for dismissal did not make final act a "past act". *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988).

This case does not involve an incident of carelessness or poor work performance. Claimant understood and knew about the employer's policy against harassment. He had been previously warned that the employer had received complaints about his behavior. However, claimant continued to sexually harass not just one of his coworkers, but numerous coworkers on numerous occasions. Although claimant argued that his discharge was racially motivated, there is no evidence in the record that supports such argument. Rather, it is clear that claimant's actions were intentional and they were a substantial violation of the employer's policies and procedures.

The employer has a right to expect that an employee will not jeopardize the liability of the employer by intentionally violating policies that are in place. There is substantial evidence in the record to support the conclusion that claimant deliberately violated these rightful expectations in this case. Accordingly, the employer has met its burden of proof in establishing that the claimant's conduct consisted of deliberate acts that constituted an intentional and substantial disregard of the employer's interests. These actions rise to the level of willful misconduct. As such, benefits are denied.

DECISION:

The March 4, 2021 (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for job-related misconduct. Benefits are withheld in regards to this employer until such time as claimant is deemed eligible.



Rachel D. Morgan
Administrative Law Judge

04/29/21

Decision Dated and Mailed

rm/aa

CC: Lereco George, Claimant (by first class mail)
Riverside Plastics, Inc., Employer (by first class mail)
Nicole Merrill, IWD (email)
Joni Benson, IWD (email)

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. Individuals who do not qualify for regular unemployment insurance benefits due to disqualifying separations, but who are currently unemployed for reasons related to COVID-19 may qualify for Pandemic Unemployment Assistance (PUA). **You will need to apply for PUA to determine your eligibility under the program.** Additional information on how to apply for PUA can be found at <https://www.iowaworkforcedevelopment.gov/pua-information>.