

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**DUSTIN MULDER**  
Claimant

**MORTON BUILDINGS INC**  
Employer

**APPEAL 15A-UI-10274-JP-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 08/16/15**  
**Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the September 3, 2015, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on September 25, 2015. Claimant participated. Employer participated through human resources manager Sue Nizzia. Employer Exhibit One was admitted into the record with no objection.

**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: Claimant was employed full-time as a non CDL lead man from June 2, 2015, and was separated from employment on August 17, 2015, when he was discharged.

The employer has a code of conduct and ethics policy. Crew members are expected to act in a professional manner at all times, including when they are off duty. The employer has a zero tolerance for sexual harassment and inappropriate behavior. Claimant received training on sexual harassment.

When crew members are on stay out, they may stay in a hotel because they may have to work in other offices with other crews. Around August 11, 2015, claimant was staying at a hotel for work. Claimant called the front desk and a female employee of the hotel answered. Claimant complained about his TV not working and the female hotel employee said she would be up to fix it. After waiting a while, claimant called again and the female hotel employee said she would be right up. The female hotel employee went into claimant's room and started trying to fix his TV. Ms. Nizzia testified that when the female hotel employee turned around, claimant was watching pornography on his iPad with his hand down his pants. This made the female hotel employee uncomfortable and she left as quickly as she could. The female hotel employee reported the incident to her employer. On August 14, 2015, the female hotel employee reported the incident to claimant's foreman when she discovered that claimant was still staying at the hotel. The

foreman told the female hotel employee that had she reported the incident immediately, he would have removed claimant from the hotel immediately. On August 14, 2015, the female hotel employee also spoke with Ms. Nizzia on the phone about the incident. The female hotel employee was not aware claimant was still at the hotel until August 14, 2015. Ms. Nizzia testified that the female hotel employee said she was going to file a police report. Ms. Nizza did receive a phone call from the sheriff's department later on August 14, 2015 about claimant. On August 17, 2015, Ms. Nizzia spoke with claimant regarding the incident with the female hotel employee. Ms. Nizzia testified that claimant admitted to calling the female employee twice and having pornography playing on his iPad when she came in to his room. Claimant denied having his hands down his pants. Ms. Nizzia asked claimant why he did not shut off his pornography if he knew the female hotel employee was coming up to fix the TV. Ms. Nizzia testified claimant said he did not know why he did not shut it off.

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

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

It is the duty of an administrative law judge and 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, as the finder of fact, 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). 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 evidence you believe; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. Iowa Dep't Human Servs.*, 461 N.W.2d 603, 607 (Iowa Ct. App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14 (1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608.

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge finds the employer's version of events to be more credible than claimant's recollection of those events.

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).

Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). 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). 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 employer is entitled to establish reasonable work rules and expect employees to abide by them. Claimant was aware of the employer's code of conduct and ethics policy. The employer also provided claimant with training on sexual harassment. Furthermore, claimant was aware that the employer has a zero tolerance for sexual harassment and inappropriate behavior. On or about August 11, 2015, claimant was having problems with his TV in his hotel room. Claimant was staying in the hotel room because he was working on a job site out of town for the employer. Claimant contacted the front desk to have a hotel employee fix his TV. Claimant spoke to a female hotel employee that told him she would be up to fix his TV. Claimant waited, but the female hotel employee did not arrive to fix his TV. Claimant then called the female hotel employee again to fix his TV. The female hotel employee told him she would be right up. Claimant was now alerted that the female hotel employee was coming to his hotel room.

Claimant had been watching pornography on his iPad. When the female hotel employee knocked on his door, claimant answered the door and let her into the room. However, claimant did not stop his iPad from playing pornography while the female hotel employee was in his hotel room. It is reasonable to expect claimant's conduct might make the female hotel employee uncomfortable.

Claimant's argument that he had shut the pornography off and put the iPad under the covers is not persuasive. Claimant's argument is contradicted by the female employee's actions, including reporting the incident to claimant's employer's human resources department. The female hotel employee left his room as quickly as possible. The female hotel employee reported the incident on August 14, 2015, which was the next time she saw claimant. The female hotel employee spoke with her manager, claimant's foreman, the human resources department for the employer, and the sheriff's department because of claimant's actions. Claimant was or should have been aware that his conduct would make the female hotel employee uncomfortable and was not professional. Claimant's conduct was not in the best interests of the employer.

The employer has presented substantial and credible evidence that claimant called the female hotel employee twice, knew she was coming up to his room, and did not stop his iPad from playing pornography when she was in his room making her uncomfortable, this is a violation of the employer's policy. This is disqualifying misconduct without prior warning. Benefits are denied.

**DECISION:**

The September 3, 2015, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

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Jeremy Peterson  
Administrative Law Judge

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Decision Dated and Mailed

jp/pjs