

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RICHARD J MCVEY
Claimant

APPEAL NO. 09A-UI-04434-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

NEIGHBORHOOD PATROL INC
Employer

OC: 01/25/09
Claimant: Respondent (1)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, Neighborhood Patrol, filed an appeal from a decision dated March 18, 2009, reference 01. The decision allowed benefits to the claimant, Richard McVey. After due notice was issued a hearing was held by telephone conference call on April 15, 2009. The claimant participated on his own behalf. The employer participated by Operations Manager David Lee and Director of Human Resources Dick Rogerson.

ISSUE:

The issue is whether the claimant was discharged for substantial, job-related misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Richard McVey was employed by Neighborhood Patrol from July 29, 2008 until January 22, 2009, as a full-time security officer. He was assigned to the Hy-Vee corporate offices in West Des Moines, Iowa.

On January 21, 2009, Operations Manager David Lee received a call from the Hy-Vee head of security, a Mr. Hopson, who relayed a complaint from one of the receptionists. She had alleged Mr. McVey had asked her out on a date, left a note on her desk, and called her at home.

Mr. Lee met with Mr. McVey on January 22, 2009, to discuss the accusations. When the employer asked the claimant if he had asked the receptionist out on a date he stated it was none of the employer's business what he did in his private life, but when pressed, lied and said he had not. In fact he had asked the woman on a date and called her at her home as he felt they were "old friends" from the same small Iowa town. He actually did admit to "comments and jokes" but without any more specific information than that.

Mr. Lee notified the claimant he was discharged for sexual harassment.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 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.

871 IAC 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.

871 IAC 24.32(4) provides:

(4) Report required. The claimant's statement and the 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.

The claimant was discharged due to allegations of sexual harassment. However, there is nothing in the record to specify what this conduct entailed other than a request for a date and a phone call to a Hy-Vee employee.

Mr. McVey's credibility is certainly questionable given the fact he lied to his employer when asked about the complaint. However, even if he admitted to all the allegations, they do not rise to the level of sexual harassment even under the definition of such in the employee handbook.

The employer failed to provide any first-hand, eyewitness testimony regarding the specifics of the complaint. The complainant did not submit a written statement to either Mr. Hobson or Neighborhood Patrol. The provisions of the above Administrative Code section requires there to be actual evidence, not a mere report, if disqualification is to be imposed.

If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682 (Iowa 1976). The administrative law judge concludes that the hearsay evidence provided by the employer is not more persuasive than the claimant's denial of such conduct. The employer has not carried its burden of proof to establish that the claimant committed any act of misconduct in connection with employment for which he was discharged. Misconduct has not been established. The claimant is allowed unemployment insurance benefits.

DECISION:

The representative's decision of March 18, 2009, reference 01, is affirmed. Richard McVey is qualified for benefits, provided he is otherwise eligible.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/pjs