

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ALAN ANDERSON
Claimant

APPEAL NO. 09A-UI-11664-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT & COMPANY
Employer

**Original Claim: 07-05-09
Claimant: Respondent (2-R)**

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the August 6, 2009, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on September 17, 2009. The claimant participated in the hearing. Tony Luse, Employment Manager, participated in the hearing on behalf of the employer. Employer's Exhibits One through Five were admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time mechanic for Swift & Company from July 24, 2008 through July 8, 2009. The employer has a zero tolerance for violation of the sexual harassment policy and the claimant signed for receipt of the handbook July 25, 2008. The employer received a complaint June 29, 2009, about inappropriate comments the claimant made to his co-worker. Co-employee Brandon Ung reported that from the first day the claimant was sent to his department so Mr. Ung could train him, the claimant said he did not want to do anything but "Fuck me." Mr. Ung told him never to say anything like that again but the claimant took it as a joke and then started to do a sex act. Mr. Ung was upset and said he would tell Dennis Foster and he reported the claimant said that Dennis was not going to do a "fucking thing." The claimant continued to do the sex act on Mr. Ung and on the saws. Mr. Ung reported that the claimant did this repeatedly. After reading the complaint, the employer suspended the claimant while an investigation was conducted. Co-employees reported the claimant frequently used obscene remarks. He told Bob Sullivan that the air pressure was so low that it would not "blow the piss off his dick." The claimant also said he would use his "dick" to measure a flex shaft. He told one employee to "whip" out his "pecker" and measure a wizard knife. A female employee told him to quit talking like that and the claimant asked her if she did not like "woodpeckers" because that was what he was talking about. He used the "F" word daily and made comments

to one employee about bending him over. The claimant called a female employee a bitch, a dyke, and a whore. Additionally, he was rude to his co-employees and repeatedly argued with one in the knife room. The employer's investigation confirmed the claimant's frequent use of inappropriate remarks. He was discharged July 8, 2009, for violation of the sexual harassment policy.

The claimant has claimed and received unemployment insurance benefits since his separation from this employer.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for job-related misconduct.

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.

The claimant was discharged July 8, 2009, for violation of the employer's sexual harassment policy. He denied making some of the inappropriate comments but admitted making others. An employer has the right to expect decency and civility from its employees, and an employee's use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct disqualifying the employee from receipt of unemployment insurance benefits. Henecke v. Iowa Department of Job Service, 533 N.W.2d 573 (Iowa App.

1995). The claimant's violation of the sexual harassment policy shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. The employer has met its burden of establishing work-connected misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits are denied.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code section 96.3-7. In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

DECISION:

The August 6, 2009, reference 01, decision is reversed. 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. The claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/kjw