

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRUCE A JOHNSON
Claimant

APPEAL NO. 09A-UI-02038-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DAVIS COUNTY HOSPITAL
Employer

**OC: 12/28/08 R: 03
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from a decision of a representative dated February 9, 2009, reference 01, which denied benefits based upon his separation from Davis County Hospital. After due notice was issued, a hearing was scheduled for and held on March 2, 2009. The claimant participated personally. Although duly notified the employer indicated that they chose not to participate.

ISSUE:

At issue in this matter is whether the claimant was discharged for intentional misconduct in connection with his work.

FINDINGS OF FACT:

The administrative law judge having heard the testimony and considered all of the evidence in the record, finds: The claimant worked for this employer from September 2008 until December 31, 2008 when he was discharged from employment. Mr. Johnson worked as a full-time janitor and was paid by the hour. His immediate supervisor was Mr. Thad Gray.

The claimant was discharged on December 31, 2008 after a female worker alleged that the claimant had touched her at work. Mr. Johnson had placed his hand upon the female's shoulder in a conversation. The claimant did not mean to startle, intimidate or inappropriately touch the female worker and did not realize that his conduct could lead to his discharge although he had been warned for similar conduct one week before. It appears that Mr. Johnson believed that his previous warning was served on him because he had inadvertently frightened a worker by touching the worker on the shoulder. The claimant did not believe that his most recent conduct was a violation of the warning that had been served upon him or that it would result in his termination from employment.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Johnson intentionally violated company policy. It does not.

In this case although the claimant had been warned by the employer for similar conduct it appears that Mr. Johnson did not realize that the act of touching a female worker in and of itself was questionable conduct that could be interpreted in various ways depending upon how the recipient viewed the claimant's actions. Because Mr. Johnson had not startled the most recent individual by touching her during a conversation, he did not believe that it was a violation of the warning that had been served upon him or a violation of hospital policy.

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 denial of unemployment insurance benefits. Misconduct that is serious enough to warrant the discharge of an employee is at times not necessarily serious enough to warrant the denial of unemployment insurance 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 1992). Allegations of misconduct without additional evidence are not 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 direct and satisfactory evidence and does not do so it may fairly be inferred that the more direct evidence may expose deficiencies in the party's case. See Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682 (Iowa 1976).

While the decision to terminate Mr. Johnson was undoubtedly a good decision from a management viewpoint, for the above-stated reasons the administrative law judge concludes that the employer had not sustained its burden of proof in establishing intentional disqualifying misconduct at the time of separation. Unemployment insurance benefits are allowed providing the claimant meets all other eligibility requirements of Iowa 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.

DECISION:

The representative's decision dated February 9, 2009, reference 01, is reversed. The claimant was dismissed under nondisqualifying conditions. Unemployment insurance benefits are allowed, providing the claimant meets all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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