

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KEVIN G BARTON
Claimant

APPEAL NO. 09A-UI-10845-S

**ADMINISTRATIVE LAW JUDGE
DECISION**

BANKERS TRUST CO
Employer

**Original Claim: 06/26/09
Claimant: Appellant (1)**

Section 96.5-2-a – Discharge
871 IAC 24.32(1) – Definition of Misconduct

STATEMENT OF THE CASE:

The claimant appealed a department decision dated July 24, 2009, reference 01, that held he was discharged for misconduct on June 25, 2009, and that denied benefits. A hearing was held on August 19, 2009. The claimant participated. Sharon Gaddy-Hanna, HR/VP, and Lisa Baker, VP/Branch Administrator, participated for the employer. Employer Exhibits One, Two, and Three were received as evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with employment.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered the evidence in the record, finds: The claimant began employment as a full-time cash vault teller on January 31, 2005, and last worked for the employer on June 25, 2009. The claimant received an employee handbook that contained the standard of ethical conduct policy of the employer. The policy prohibits behavior that is perceived as discriminatory or harassing based on gender or sexual orientation, which includes remarks, jokes, and derogatory statements.

During the course of employment, Administrator Baker had some coaching sessions with the claimant about his conduct and e-mail communications with employees. The claimant was counseled by his supervisor on December 18, 2008 for an unprofessional and inappropriate remark he made to another employee.

On March 25, 2009, the claimant received a written warning for violation of the employer ethical conduct policy regarding an incident that occurred at the bank on February 27. While dealing with a person employed by customer SODEXO, the claimant stated "What are you, gay or homo." The person complained to his SODEXO supervisor that he considered the remark offensive. The claimant acknowledged the warning, which put him on notice that a further incident could mean termination from employment.

The employer discharged the claimant on June 25, 2009 for inappropriate conduct with a customer employee that occurred on June 24. The claimant had a working relationship with Anne Ackerman, who is employed by the Federal Employees Credit Union, which is a customer of the bank. Ackerman had told the claimant of a recent visit to Colorado, and he stated that he would be going there on a visit, so she stated he could access her Facebook to view pictures of her trip.

On June 22/23, Barton sent messages to Ackerman with statements, "I wish I could eat your pussy," "cum up," "you have such a sexy, cute voice," and "where is the most interesting place you've had sex?" The messages were sent from claimant's residence off company time, and he admits he was under the influence of alcohol. Ackerman reported to the employer the messages were offensive and made her feel uncomfortable, such that it would be difficult for her to continue to deal with the employer as a F.E.C.U. representative, since she would have to confront the claimant.

The employer had a meeting with the claimant regarding Ackerman's complaint. The claimant admitted he sent the messages and they were inappropriate, but he defended his conduct by stating it occurred outside the workplace and not on company time.

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.

The administrative law judge concludes the employer has established that the claimant was discharged for misconduct in connection with employment on June 25, 2009, for a repeated violation of the standard of ethical conduct.

The claimant knew the employer's policy, due to a prior warning with coaching/counseling, and after the March 5 warning that a further violation could lead to termination. While his most recent warning involved an offensive comment to a customer representative at the bank, he was put on notice that such conduct with any customer would not be tolerated. The claimant had no social relationship with Ackerman, only a customer representative relationship, such that his sexual communications to her violate the employer's policy even though communicated off employer premises and on his own time.

DECISION:

The department decision dated July 24, 2009, reference 01, is affirmed. The claimant was discharged for misconduct on June 25, 2009. Benefits are denied until the claimant requalifies by working in and being paid wages for insured work equal to ten times his weekly benefit amount, provided the claimant is otherwise eligible.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/kjw