

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

PAMELA J HANNA
Claimant

APPEAL NO. 13A-UI-05500-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING COMPANY
Employer

OC: 04/07/13
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Claimant filed a timely appeal from a representative's decision dated April 29, 2013, reference 01, which denied unemployment insurance benefits. After due notice was provided, a telephone hearing was held on June 11, 2013. Claimant participated. Participating on behalf of the claimant was Shawn Thompson, Attorney at Law. The employer participated by Ms. Teresa Garrett, Area Supervisor. Employer's Exhibits One, Two, Three and Four were offered into evidence but not received because the claimant was not provided copies.

ISSUE:

The issue is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Pamela Hanna was employed by Casey's Marketing Company from September 21, 2009 until April 10, 2013 when she was discharged from employment. Ms. Hanna last held the position of full-time store manager and was paid by salary. Her immediate supervisor was Teresa Garrett, Area Manager.

Ms. Hanna was discharged from her employment as a store manager for Casey's Marketing Company based upon statements from employees indicating that Ms. Hanna had violated the company's policies of employee conduct and the company's harassment-free policies by making inappropriate remarks related to an employee's sexual orientation to a person that was being newly hired by the company and to another employee following an interview.

It was the employer's belief that Ms. Hanna had openly discussed the employee's sexual orientation and the claimant's statement had caused embarrassment and humiliation to the employee that Ms. Hanna was speaking about as well as to female employee who was present.

Because Ms. Hanna was a store manager and was aware of the company's policy which prohibited sexual harassment, discrimination or conduct creating a hostile work environment, a decision was made to terminate Ms. Hanna as she set a poor example for other workers.

During the incident in question, the female employee who had just undergone a job interview and had been hired by the company had made remarks about a male worker employed at the location making reference to the cleanliness of the male employee's house exceeding that of a woman making reference to pink paint in the living room. The claimant who had not initiated the conversation apparently inadvertently made the statement, "Is he gay?" to unexpected statements made by the other individual. Ms. Hanna made a short similar response to the statement that was then made by a female clerk apparently ending the exchange.

Ms. Hanna apparently considered the matter closed until approximately two to three weeks later when one or more of the individuals who had initiated the conversation with Ms. Hanna informed the male worker. The male worker and one of the employees who had initiated the conversation with Ms. Hanna then complained to management. The employer believed that Ms. Hanna had been an active participant in initiating the conversation and continuing it and, therefore, made a management decision to terminate Ms. Hanna believing that she had violated company policy and set a bad example for other employees.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes intentional misconduct on the part of the claimant sufficient to deny unemployment insurance benefits. It does not.

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.

In discharge cases the employer has the burden of establishing disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating the claimant but whether the claimant is entitled to unemployment insurance benefits. Infante v. Iowa Department of Job Service, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of employment and what misconduct warrants the denial of unemployment insurance benefits are two separate decisions. Pierce v. Iowa Department of Job Service, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge may not necessarily be serious enough to warrant a denial of unemployment insurance benefits. Such misconduct must be "substantial."

An employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job-related misconduct as the reason for the separation, the employer incurs potential liability for unemployment insurance benefits related to that separation.

Allegations of misconduct 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. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence would expose deficiencies in that party's case. See Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682 (Iowa 1976).

In this matter, Ms. Hanna participated personally and provided sworn firsthand testimony testifying that she did not initiate the conversation about the sexual orientation of a male employee but testifying that she only inadvertently responded to statements by a newly hired employee and another female worker who had unexpectedly made comments about a male employee. The evidence does not establish that Ms. Hanna initiated or encouraged the conversation but only that she reacted to unexpected statements by responding in a sentence or less to each individual concluding the subject. It appears that Ms. Hanna considered the matter closed and heard nothing further for two to three weeks. During the interim, one or more of the parties who initiated the conversation themselves informed the male worker then joined the male worker in complaining to management about the conduct that they had initiated.

The employer in contrast has relied upon hearsay in support of its position that Ms. Hanna had initiated and was an active participant in an ongoing exchange about a sexually inappropriate topic at work.

Although the employer had taken statements from the parties, the employer did not submit any of the statements in support of its position that Ms. Hanna had been an active participant and had acted inappropriately. The employer also did not bring as witnesses either of the two individuals that were involved in the alleged conversation with Ms. Hanna although they are employed by the company.

While hearsay is admissible in administrative proceedings, it cannot be accorded the same weight as sworn, direct testimony providing the testimony is credible and not inherently improbable.

While the administrative law judge does not condone nor sanction inappropriate sexual conversation or the creation of a hostile work environment, for the above-stated reasons the administrative law judge concludes that the evidence in the record is not sufficient to establish intentional, disqualifying misconduct on the part of the claimant sufficient to warrant the denial of unemployment insurance benefits.

The administrative law judge concludes based upon the evidence in the record that the claimant's conduct at worse was an isolated instance of poor judgment that was limited to a short response on two occasions to unexpected statements that were made to her by other workers. While the decision to terminate Ms. Hanna may have been a sound management decision, the claimant's conduct did not rise to the level of intentional, disqualifying misconduct. Benefits are allowed, providing the claimant is otherwise eligible.

DECISION:

The representative's decision dated April 29, 2013, reference 01, is reversed. The claimant was discharged under non disqualifying 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

pjs/pjs