

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all of the evidence in the record, the administrative law judge finds: Ms. Vogel was employed by Walgreen Company from October 27, 2001 until September 2, 2005 as a full-time pharmacy technician. On or about August 3, 2005, two of her coworkers reported that Ms. Vogel was engaging in unwanted touching. The complaint was that she touched them on the thigh, hips, and buttocks.

Cheanne Cosgrove reported that Ms. Vogel would touch her as the two maneuvered through the space in the pharmacy. Ms. Cosgrove did not feel the touching was sexual in nature. She attributed it to the walkway in the pharmacy that she described as being approximately three feet wide. There was an occasion when Ms. Cosgrove first began the employment three years ago when Ms. Vogel would refer to her as her "hemorrhoid." She discontinued the name-calling when Ms. Cosgrove indicated an objection.

Carol Vermillion complained that Ms. Vogel had placed a hand on either side of her hips while standing behind her. She also complained that Ms. Vogel's shoulder would brush against the side of her breast. She felt Ms. Vogel had a tendency to stand too close. Ms. Vermillion also complained that Ms. Vogel had told others that her husband was having an affair. It was Ms. Vermillion who told Ms. Vogel about the affair.

The employer did not address the August 3 complaints with Ms. Vogel until the day of discharge, September 2. During the interim, Laura Dickinson and Eric Rode were out of town in Las Vegas from August 5 until August 12 and in Chicago from August 15 until August 18. The discharge was further delayed until arrangements could be made to travel to Ms. Vogel's work location. The above matter was the sole reason for the discharge.

REASONING AND CONCLUSIONS OF LAW:

At issue in this matter is whether Ms. Vogel was separated from employment for any disqualifying reason. An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Moreover, the employer's burden included establishing that the discharge was predicated on a current act of misconduct. See 871 IAC 24.32(8). In the case at hand, the conduct that brought about Ms. Vogel's discharge came to the employer's attention on August 3, but she was not discharged until September 2. During the interim, she was not told she was being considered for discharge. The administrative law judge appreciates that the individuals making the discharge decision were out of town on two occasions. However, they were back by August 18 but still waited two weeks before discharging Ms. Vogel.

The employer's delay in discharging Ms. Vogel precludes a finding of a current act of misconduct. Inasmuch as the employer has failed to establish a current act of misconduct, no disqualification may be imposed.

DECISION:

The representative's decision dated September 23, 2005, reference 01, is hereby affirmed. Ms. Vogel was discharged by Walgreen Company but a current act of misconduct has not been established. Benefits are allowed, provided she satisfies all other conditions of eligibility.

cfc/kjw