

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

GENE GENO
Claimant

APPEAL NO: 13A-UI-02813-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

FAREWAY STORES INC
Employer

OC: 02-13-13
Claimant: Appellant (1)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the March 5, 2013, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on April 8, 2013. The claimant participated in the hearing. Teresa McLaughlin, Human Resources Generalist; David Noack, Store Manager; and John Kramer, Store Supervisor; participated in the hearing on behalf of the employer.

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 part-time grocery clerk for Fareway Stores from February 3, 2012 to February 8, 2013. He submitted a resignation notice February 7, 2013, because he was aware the employer was going to terminate his employment February 8, 2013. Under these circumstances, the separation issue must be analyzed as a termination of employment.

On January 22, 2013, the claimant was working with co-worker, Kyle Ihde, and made comments of a sexual nature to Kyle regarding co-worker, Michelle. He said, "Have you ever thought about Michelle being one of those people that calls you about sex. I think she would be a great phone sex caller because of her high pitched voice. I think it would be just perfect." Mr. Ihde reported the comments to Michelle and the claimant's statements were also reported to the employer.

On January 31, 2013, Store Supervisor John Kramer and an assistant manager met with the claimant to discuss the claimant's statements regarding Michelle. The claimant denied making the comments or having a conversation of that nature with Mr. Ihde at all. The employer suspended the claimant indefinitely pending further investigation of the incident.

The claimant received a written warning October 5, 2012, after four female customers complained within a three-week period about the claimant asking them for their phone numbers in the store and when he helped them take their groceries out to the parking lot and to their vehicles. The warning stated the claimant's actions were unacceptable and any "future action in this matter could result in further disciplinary action which may result in suspension and or termination." Other employees also reported overhearing the claimant asking female employees for their phone numbers.

The claimant expected to hear from the employer within three days following the January 31, 2013, meeting. The employer planned to meet with the claimant February 8, 2013, but before that meeting could occur the claimant contacted Assistant Manager Chad Kaiser February 7, 2013, to ask about his job status. He asked Mr. Kaiser if it looked good or bad and Mr. Kaiser stated it was probably bad and the claimant asked if he should resign and Mr. Kaiser indicated he probably should do so. The claimant then prepared his resignation notice stating, "I truly regret having to relinquish my job at Fareway. I feel the continued lies and accusations will not end, resulting in slander of my name and being fired from a job I truly loved and enjoyed. I also feel this in house or outside "customer" problem will still be there only to hurt someone else in the future."

The employer had made the decision to terminate the claimant's employment and planned to notify him of its decision February 8, 2013, but accepted the claimant's resignation February 7, 2013.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to 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 demonstrated a pattern of inappropriate behavior toward women, both in asking for their phone numbers, whether assisting them in the store or helping them out to the parking lot with their groceries, notably in September and October 2012, and when speaking about co-worker Michelle January 22, 2013. While the claimant denies all allegations, the four women who called to complain had no known connection to the claimant and it is extremely unlikely there was any kind of conspiracy to attempt to have his employment terminated. Similarly, the claimant admits he and Kyle, who reported the claimant's comments of a sexual nature regarding co-worker Michelle to the employer, did not have any personality or work conflicts between them. The claimant made unacceptable and unprofessional comments regarding Michelle, after being warned about inappropriate actions toward female customers in October 2012. Under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits are denied.

DECISION:

The March 5, 2013, reference 01, decision is affirmed. 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.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs