IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DAVID W SCHOSSOW
Claimant

VAN DIEST SUPPLY CO
Employer

APPEAL NO. 10A-UI-06117-HT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/21/10
Claimant: Respondent (1)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, Van Diest Supply Company (Van Diest), filed an appeal from a decision dated April 14, 2010, reference 01. The decision allowed benefits to the claimant, David Schossow. After due notice was issued a hearing was held by telephone conference call on June 10, 2010. The claimant participated on his own behalf. The employer participated by Manufacturing Manager Clark Vold and Personnel Director Carolyn Cross. Exhibits One and Two were admitted into the record.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

David Schossow was employed by Van Diest from December 2, 2008 until March 22, 2010 as a full-time production worker. On March 19, 2010, an employee, Ms. Runyon, approached her supervisor and the claimant's supervisor, to complain about him touching her. She asserted he had encountered her on a stairway in the building and put his arm around her shoulders. When she told him to stop, he did so. But later that same day he came up to her while she was sitting in a chair, and "brushed his hand up against" her ear and hair. She again told him to stop and he did.

The supervisors had Ms. Runyon write a statement and this was submitted to Manufacturing Manager Clark Vold and Quality Manager Grant Sletten. The parties were interviewed by Mr. Vold and Director of Plant Operations Kevin Spencer on Monday, March 22, 2010. The claimant denied he had done anything except put his hand on Ms. Runyon's shoulder to get her attention as he was going to talk to her in the lab about a sample he had brought in. When she told him not to touch her, he left immediately.

The claimant was discharged for violation of the employer's sexual harassment policy on March 22, 2010.

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 employer has the burden of proof to establish the claimant was discharged for substantial, job-related misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). In the present case the claimant had denied any physical contact with this female co-worker except to touch her shoulder to get her attention while she was reading. The administrative law judge cannot conclude this rises to the level of sexual harassment or misconduct sufficient to warrant a denial of unemployment benefits.

Ms. Runyon is still an employee of Van Diest but did not participate in the hearing to provide any firsthand testimony. If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. *Crosser v. Iowa Department of Public Safety*, 240 N.W.2d 682 (Iowa 1976).

The administrative law judge concludes that the hearsay evidence provided by the employer is not more persuasive than the claimant's denial of such conduct. The written statement from Ms. Runyon is insufficient. The employer has not carried its burden of proof to establish that the claimant committed any act of misconduct in connection with employment for which he was discharged. Misconduct has not been established. The claimant is allowed unemployment insurance benefits.

DECISION:

The representative's decision of April 14, 2010, reference 01, is affirmed. David Schossow is qualified for benefits, provided he is otherwise eligible.

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Bonny G. Hendricksmeyer
Administrative Law Judge

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Decision Dated and Mailed

bgh/pjs