

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

FRANCISCO E MORRISON
Claimant

APPEAL NO. 18A-UI-09742-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CRESLINE PLASTIC PIPE CO INC
Employer

**OC: 11/12/17
Claimant: Respondent (2)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.3(7) - Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the September 14, 2018, reference 04, decision that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on the Benefits Bureau deputy's conclusion that the claimant was discharged on July 30, 2018 for no disqualifying reason. After due notice was issued, a hearing was held on October 19, 2018. Claimant Francisco Morrison participated. Elizabeth Jackson represented the employer and presented additional testimony through Rachel Prinzing, Jason Mulkey, Ralph Mericle and Josh Fingerhut. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 through 6 into evidence.

ISSUES:

Whether Mr. Morrison was discharged for misconduct in connection with the employment that disqualifies him for unemployment insurance benefits.

Whether Mr. Morrison was overpaid benefits.

Whether Mr. Morrison must repay overpaid benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Francisco Morrison was employed by Cresline Plastic Pipe Company, Inc. as a full-time "Utility" from 2016 until July 30, 2018, when Ralph Mericle, Plant Manager, Elizabeth Jackson, Human Resources Director, discharged him from the employment for sexually harassing temp worker Rachel Prinzing. At the time of the harassment, Ms. Prinzing was working through a temporary employment agency in a temp-to-hire work assignment at Cresline. Mr. Morrison was assigned to train Ms. Prinzing and provide feedback to Cresline that would factor in the company's decision regarding whether to hire Ms. Prinzing. Mr. Morrison and Ms. Prinzing were each

assigned to the third shift. Ms. Prinzing was the only female assigned to the third shift. The work hours for the third shift began at midnight and ended at 8:00 a.m. Production Supervisor Jason Mulkey supervised both Mr. Morrison and Ms. Prinzing.

The bulk of the sexual harassment took place during the Sunday, July 22, 2018 overnight shift. Ms. Prinzing was assigned to perform "coiling" for the latter half of the shift. Coiling involved coiling pliable PVC pipe. Ms. Prinzing was not feeling well and asked Mr. Morrison whether he would perform the coiling duties during the shift. Mr. Morrison told Ms. Prinzing that he would consider her request, but that he would want something in return. About 20 minutes later, Mr. Morrison told Ms. Prinzing that he wanted sex with Ms. Prinzing in exchange for performing the coiling duties. Ms. Prinzing attempted to change the subject, but Mr. Morrison persisted. Mr. Morrison told Ms. Prinzing he wanted her stripped naked so that he could do to her what he wanted. Ms. Prinzing told Mr. Morrison that it was not going to happen, that she had a boyfriend, and that she was not a cheater. Though Ms. Prinzing rebuffed Mr. Morrison's advance, Mr. Morrison returned to the proposition twice more during the shift. During these subsequent contacts, Mr. Morrison told Ms. Prinzing that she was just playing hard to get, that she knew she wanted it, and that his wife would not mind if he had sex with Ms. Prinzing. Mr. Morrison told Ms. Prinzing that she should have known that he would want sex and that she could not be mad about him asking for it. Ms. Prinzing was shaken by the interaction.

During the Monday, July 23 overnight shift Mr. Morrison twice returned to the same topic when speaking with Ms. Prinzing. Mr. Morrison asked Ms. Prinzing whether she was mad that he had asked her for sex and told her that she should not be mad about it. During that shift and the shifts that followed, Ms. Prinzing attempted to avoid Mr. Morrison as much as possible.

Toward the end of the shift that ended on Wednesday, July 25, Ms. Prinzing was visibly upset when she went to Mr. Mulkey's office to get a tool she needed for her work. Mr. Mulkey saw that Ms. Morrison was upset and asked her what was going on. At that time, Ms. Prinzing shared that Mr. Morrison had made an unwelcome sexual advance that made her uncomfortable. Ms. Prinzing declined to repeat the exact language Mr. Morrison had used due to the graphic nature of the utterance. Ms. Prinzing expressed concern that bringing the matter forward might negatively impact her chances of being hired by Cresline. Mr. Mulkey promptly reported the matter to Ralph Mericle, Plant Manager. Mr. Mericle interviewed Ms. Prinzing over the phone and then consulted Elizabeth Jackson, Human Resources Director.

On the morning of July 26, Ms. Jackson and Mr. Mericle re-interviewed Ms. Prinzing and interviewed Mr. Morrison. Mr. Morrison denied having offered to help Ms. Prinzing in exchange for sex. Mr. Morrison denied knowledge of the sexual harassment and anti-discrimination policies set forth in the employee handbook the employer provided to him at the time of hire. Mr. Morrison went on to provide a rather overblown denial. Mr. Morrison asserted that his mind was blown, that he did not understand, that he had "never had problems with a female before," that he had a wife and kids, and that he did not understand why Ms. Prinzing would say what she had or why someone would tell her to say what she had. In a further attempt to undermine Ms. Prinzing's credibility, Mr. Morrison told the employer that Ms. Prinzing had given him her phone number, but that he had never used it. Weeks earlier, Mr. Morrison had requested Ms. Prinzing's phone number under the pretext of inviting her to a Fourth of July gathering. Ms. Prinzing had provided the number for that purpose and no other. Mr. Morrison thereafter did not follow up on the invitation and Ms. Prinzing did not join the gathering. Following the interview of Mr. Morrison, Ms. Jackson and Mr. Mericle suspended Mr. Morrison pending completion of the employer's investigation.

Also on the morning of July 26, Ms. Jackson and Mr. Mericle interviewed employees Zach Dube and Tyler Banik. On Monday, July 23, Ms. Prinzing had confided in Mr. Dube that Mr. Morrison had said he would help her in exchange for sex and that the interaction had made her uncomfortable. Mr. Dube told the employer that he had noticed, prior to Ms. Prinzing sharing information with him, that she appeared uncomfortable and that he had noticed Mr. Morrison going out of his way to initiate contact with Ms. Prinzing when no one else was around.

On July 27, Ms. Jackson and Mr. Mericle interviewed Josh Fingerhut. Mr. Fingerhut had been the supervisor on duty during the July 22 overnight shift. Mr. Fingerhut shared with the employer that he had not seen or heard a sexually harassing incident, but had discerned something was wrong. Mr. Fingerhut told the employer that Mr. Morrison had been acting in an odd manner and that he had observed Ms. Prinzing going out of her way to avoid contact with Mr. Morrison and another employee, Steve Sturdivant. Mr. Fingerhut told the employer he had questioned Ms. Prinzing regarding why she was not helping Mr. Morrison and Mr. Sturdivant and that Ms. Prinzing had replied, "They are gonna get in trouble if you found out what they were doing."

By July 30, 2018, the employer had completed its investigation and had consulted with legal counsel. The employer concluded that Ms. Prinzing had made a credible report of sexual harassment and that Mr. Morrison's actions exposed the employer to potential liability. On July 30, Mr. Mericle mailed the discharge letter to Mr. Morrison by certified mail, signature required. Mr. Morrison had not yet received the termination letter at the time he went to the workplace on August 1 or 2 to inquire about the status of his employment. At that time, a human resources representative notified Mr. Morrison that he was discharged from the employment.

Mr. Morrison established an original claim for unemployment insurance benefits that was effective November 12, 2017 and an "additional claim" for benefits that was effective August 5, 2018. Iowa Workforce Development set Mr. Morrison's weekly benefit amount at \$516.00. In connection with the additional claim, Mr. Morrison was approved for \$5,160.00 in benefits for the 10 weeks between August 5, 2018 and October 13, 2018. All but one week of benefits was paid out to Mr. Morrison. The \$516.00 in benefits approved for the week that ended August 11, 2018, were held back and off-set to recover a prior overpayment of benefits. Cresline Plastic Pipe Company is the sole base period employer in connection with the claim.

On September 12, 2018, an Iowa Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed Mr. Morrison's separation from the employment. Elizabeth Jackson, Human Resources Director, represented the employer at the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See *Lee v. Employment Appeal Board*, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See Iowa Administrative Code rule 871-24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also *Greene v. EAB*, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty 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 Iowa Administrative Code rule 871-24.32(4).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa Ct. App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder

may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

The weight of the evidence in the record establishes a discharge for misconduct in connection with the employment. There is no reason whatsoever to doubt the testimony provided by Ms. Prinzing concerning the crude, demeaning sexually harassment Mr. Morrison subjected her to on July 22 and 23, 2018. Ms. Prinzing has on several occasions, and to several people, provided consistent and candid statements regarding the matter. Ms. Prinzing told others early on regarding the sexual harassment. Ms. Prinzing has at all relevant times acted in a manner consistent with her having been subjected to unwelcome sexual advances perpetrated by Mr. Morrison. This includes acting to preserve her dignity to the extent possible in the face of a crude, demeaning experience. On the other hand, Mr. Morrison's blanket denial and further over-the-top denials are not credible. In an attempt to undermine Ms. Prinzing's credibility, Mr. Morrison paints Ms. Prinzing as a thwarted sexual aggressor in the face of overwhelming evidence indicating the opposite. The conduct that Mr. Morrison directed at Ms. Prinzing was not a momentary lapse in judgment or miscommunication. It was instead a premeditated vulgar quid pro quo proposition followed by repeated hounding of Ms. Prinzing. That then was followed by an attempt to cover the transgression. The weight of the evidence establishes that Mr. Morrison was at all relevant times fully aware that he was engaging in sexually harassing behavior and was at all relevant times aware that his conduct violated the employer's harassment policy. Because the evidence establishes a discharge for misconduct in connection with the employment, Mr. Morrison is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. Mr. Morrison must meet all other eligibility requirements.

The unemployment insurance law requires that benefits be recovered from a claimant who receives benefits and is later deemed ineligible benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the base period employer failed to participate in the initial proceeding, the base period employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

Mr. Morrison received \$5,160.00 in benefits for the 10 weeks between August 5, 2018 and October 13, 2018, but this decision disqualifies him for those benefits. Accordingly, the benefits Mr. Morrison received constitute an overpayment of benefits. Because the employer participated in the fact-finding interview, Mr. Morrison is required to repay the overpaid benefits. The employer's account will be relieved of liability for benefits, including liability for benefits already paid.

DECISION:

The September 14, 2018, reference 04, decision is reversed. The claimant was discharged on July 30, 2018 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. The claimant must meet all other eligibility requirements. The claimant is overpaid \$5,160.00 in benefits for the 10 weeks between August 5, 2018 and October 13, 2018. The claimant must repay the overpaid benefits. The employer's account shall be relieved of liability for benefits, including liability for benefits already paid to the claimant.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs