

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

BLAKE R DUSHECK
Claimant

APPEAL NO. 18A-UI-10991-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARGILL KITCHEN SOLUTIONS INC
Employer

OC: 10/07/18
Claimant: Appellant (1)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Blake Dusheck filed a timely appeal from the November 5, 2018, reference 02, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on the Benefits Bureau deputy's conclusion that Mr. Dusheck was discharged on October 9, 2018 for violation of a known company rule. After due notice was issued, a hearing was held on November 26, 2018. Mr. Dusheck participated. Holly Platts represented the employer. The hearing in this matter was consolidated with the hearing in Appeal Number 18A-UI-10992-JTT. Exhibit 1 was received into evidence. The administrative law judge took official notice of the Agency's administrative record of benefits disbursed to the claimant.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Blake Dusheck was employed by Cargill Kitchen Solutions, Inc. as a full-time Processing Team Member from 2016 until October 9, 2018, when Holly Platts, Employee Relations Senior Specialist, discharged him from the employment for harassing female coworkers in violation of the employer's harassment policy. The employer uses temporary workers from Dougherty Staffing. On September 25, 2018, Dougherty employee Desiree Clevinger complained to Dougherty onsite representative Erica Simmer about Mr. Dusheck. Ms. Clevinger provided a written statement to Ms. Simmer in which she wrote that Mr. Dusheck had asked her two weeks earlier where she lived and who she lived with. Ms. Clevinger wrote that she told Mr. Dusheck she lived with her boyfriend. Ms. Clevinger wrote that female coworkers had described Mr. Dusheck as "a perv that hits on girls a lot during work." Ms. Clevinger wrote that Mr. Dusheck had previously made comments to her that she shrugged off. Ms. Clevinger wrote that Mr. Dusheck more recently asked her, "Who has the bigger bed?" Ms. Clevinger wrote that Mr. Dusheck bumped her buttocks with his hips. Ms. Clevinger wrote that Mr. Dusheck asked whether they could "hang out." Ms. Clevinger wrote that Mr. Dusheck asked her if she wanted to have sex. Ms. Clevinger wrote that Mr. Dusheck said unless he got a solid no, he would

conclude the answer was yes. Ms. Clevinger wrote that she attempted to ignore Mr. Dusheck. Ms. Clevinger wrote that Mr. Dusheck tried to get her to take her break with him, that he stated he was “the best-looking guy in the room,” and that he stated she must want to say yes to his proposition because she was blushing. Ms. Simmer contacted Ms. Platts in response to receiving Ms. Clevinger’s verbal complaint and written statement. Ms. Simmer provided Ms. Platts with a copy of Ms. Clevinger’s written statement. Ms. Platts reviewed the written statement, but did not interview Ms. Clevinger.

On September 26, 2018, Ms. Platts interviewed Mr. Dusheck regarding the allegations set forth in Ms. Clevinger’s written statement. Ms. Platts asked Mr. Dusheck if he realized he had upset someone in the workplace. Mr. Dusheck responded that he knew what the interview was about because another employee, Tanya Schwarzkopf, had already confronted him about the matter. Mr. Dusheck told Ms. Platts that he never knew how to gauge others’ reactions to him until it is too late and that no one had told him they were uncomfortable. Ms. Platts asked Mr. Dusheck whether he had asked Ms. Clevinger personal questions. Mr. Dusheck told Ms. Platts that he had asked Ms. Clevinger personal questions, but did not feel that he had crossed the line. Ms. Platts asked Mr. Dusheck whether he had asked Ms. Clevinger to go on break with him. Mr. Dusheck told Ms. Platts that he had asked Ms. Clevinger on September 25 to go on break at the same time as him, but that he had not asked her to spend her break with him. When Ms. Platts asked Mr. Dusheck about the “best-looking guy in the room” comment, Mr. Dusheck admitted to making the comment, but added that he had intended the utterance as a mean joke at the expense of another male employee. Mr. Dusheck told Ms. Platts that he uses humor “in the wrong way,” that he was “more perverted than [he] needed to be,” and that he had “a dirty mind.” Mr. Dusheck admitted that he had touched Ms. Clevinger, but asserted the contact was “Platonic.” Mr. Dusheck told Ms. Platts that if he had been asked to stop he would have, but that no one had asked him to stop. Mr. Dusheck stated that he could understand how his actions might make someone uncomfortable. Mr. Dusheck told Ms. Platts that he felt that he had been taken wrong, that if he had hurt Ms. Clevinger’s feelings he was sorry, and that if he had been asked to stop he would have. At the end of the interview, Ms. Platts told Mr. Dusheck that the allegations were serious, that the matter involved potential violation of the employer’s harassment policy and could lead to termination of the employment, and that Mr. Dusheck would be suspended with pay pending further investigation.

While Mr. Dusheck was suspended with pay, Ms. Platts interviewed two female employees Ms. Clevinger had referenced in her written statement. On October 5, Ms. Platts interviewed Cargill employee Heather Trainer. Ms. Trainer spoke of interactions with Mr. Dushek, but was unable to provide dates for those interactions. Ms. Trainer alleged that Mr. Dusheck had tried to run into her with his elbow. Ms. Trainer told Ms. Platts that Mr. Dusheck had told her, “Get your butt going...your butt is nicer.” Ms. Trainer told Ms. Platts that in response her casual statement that she wanted to go home, Mr. Dusheck had stated “but I’m not there.” Ms. Platts also interviewed Cargill employee Tanya Schwarzkopf. Ms. Schwarzkopf told Ms. Platts that Mr. Dusheck “does not know how to reign himself in” and that he had ceased directing comments at her after she told him she was old enough to be his mother. Ms. Schwarzkopf told Ms. Platts that Mr. Dusheck had asked why another female temporary worker had not returned and had said, “Girls like that like that kind of attention.” Ms. Platts did not discuss Ms. Schwarzkopf’s or Ms. Trainer’s allegations with Mr. Dusheck.

On October 9, the employer notified Mr. Dusheck that he was discharged from the employment for violating the employer’s written harassment policy. The employer had provided the policy to Mr. Dusheck at the start of his employment. The policy prohibited sexual harassment and provided examples of sexual harassment that included unwelcome jokes, unwelcome comments of a sexual nature, and unwelcome sexual advances or physical contact. The policy

indicated that a person made uncomfortable by such conduct should tell the person engaging in the conduct to stop. The policy included guidance for reporting sexual harassment to Cargill. The policy warned that an employee found to have engaged in harassment would be subject to discipline up to and including termination of the employment. Mr. Dusheck was at all relevant times aware of the harassment policy.

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 871 IAC 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 871 IAC 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 establishes a discharge for misconduct in connection with the employment. There are problems with the evidence submitted by each side. The employer's evidence, with the exception of Exhibit 1, consisted of hearsay. The employer could have had Ms. Clevinger, Ms. Trainer, Ms. Schwarzkopf and/or Ms. Simmer testify, but elected not to present testimony from them. While the weight of the evidence provides no reason to discount the truthfulness of Ms. Platts’ testimony, judging the credibility and/or reliability of Ms. Clevinger’s written statement and the credibility of the verbal statements Ms. Simmer, Ms. Trainer and Ms. Schwarzkopf provided to Ms. Platts is more difficult. The tenor of the statements is consistent, thereby bolstering the credibility of each. On the other hand, Mr. Dusheck elected to make a clearly baseless assertion in the hearing that Ms. Clevinger, Ms. Trainer and Ms. Schwarzkopf were motivated by a conspiracy to take his job. Nothing in the record supports that assertion. Mr. Dusheck’s decision to employ the spurious assertion undermines his credibility. Likewise, Mr. Dusheck’s attempt to shift the focus away from his purported actions to allegedly worse conduct perpetrated by a male coworker undermines rather than bolsters his credibility. Thirdly, Mr. Dusheck’s attempt to disqualify Ms. Clevinger’s complaint on technicalities by faulting her for not telling him to stop, and by not submitting the complaint through the human resources portal, undermines rather than bolsters his credibility. Responses that Mr. Dusheck provided to Ms. Platts during the investigative interview essentially conceded that Mr. Dusheck had engaged in the conduct alleged in Ms. Clevinger’s written complaint without explicitly admitting to some of the conduct. Mr. Dusheck’s responses during the interview supported the employer’s reasonable conclusion that Mr. Dusheck had knowingly and intentionally directed sexually harassing comments at Ms. Clevinger on September 25 and on prior occasions in violation of the employer’s harassment policy. The weight of the evidence indicates that Mr. Dusheck was more candid when Ms. Platts interviewed him on September 26 than he was in his testimony at the appeal hearing.

The evidence in the record establishes a current act. The conduct that triggered the discharge came to the employer’s attention on September 25. The employer notified Mr. Dusheck the next day that the allegations were serious and could lead to discharge from the employment. The employer did not unreasonably delay in any aspect of the employer’s handling of the

matter. The employer notified Mr. Dusheck of the discharge decision in a timely manner following completion of the investigation.

Because the evidence in the record establishes a discharge for misconduct in connection with the employment, Mr. Dusheck 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. Dusheck must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

DECISION:

The November 5, 2018, reference 02, decision is affirmed. The claimant was discharged 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 employer's account shall not be charged for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs