

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

JOHN R SHULTZ
212 N COOPER
OTTUMWA IA 52501

KURTZ CONSTRUCTION LLC
10585 RUTLEDGE RD
OTTUMWA IA 52501

Appeal Number: 04A-UI-12686-JTT
OC: 10/24/04 R: 03
Claimant: Appellant (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant, John Shultz, filed a timely appeal from a decision of a representative dated November 17, 2004, reference 01, which held Mr. Shultz was not eligible to receive unemployment insurance benefits. After due notice was issued, a telephone conference hearing was scheduled for and held on December 16, 2004. The claimant participated personally. Kurtz Construction participated by Jackie Kurtz, Owner.

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: Mr. Shultz was employed by Kurtz Construction as a mall maintenance supervisor from December 3, 1997 until he was discharged by Ms. Kurtz on October 7, 2004 for misconduct in connection with his employment.

The last incident that prompted Ms. Kurtz to discharge Mr. Shultz came to light on October 7, 2004. On that date, Sharon Litteken, Vice President for Property Management for Sansone Corporation, notified Ms. Kurtz of sexual harassment complaints received about Mr. Shultz and demanded his immediate removal from the mall property. Sansone Corporation is the firm that manages the Quincy Place Mall in Ottumwa, Iowa. Kurtz Construction contracts with Sansone Corporation to provide maintenance at the mall. Mr. Shultz was the person chiefly responsible for mall maintenance. He supervised four employees.

Ms. Litteken advised Ms. Kurtz that two female mall employees had provided written complaints of sexual harassment by Mr. Shultz. The complaints were written on October 5 and submitted to Kelly Williams, the mall coordinator. Ms. Williams had forwarded the complaints to Sansone's corporate office. One complaint was from a store manager. The store manager set forth that Mr. Shultz had made inappropriate comments to female personnel on several occasions, indicated that each of the female staff had requested that Mr. Shultz not be allowed into the store unaccompanied, and indicated that the manager had first brought her concerns to the attention of the mall coordinator on October 2. This letter was read into the record.

The second complaint was from the assistant manager of the same store. The assistant manager asserted that at the end of September 2004, Mr. Shultz had approached her, started to rub her back with his hand, and told her that she needed to "get naked and get laid." The assistant manager also asserted that in February 2004, Mr. Shultz brought a nude photo of himself into the store and handed it to the assistant manager. The assistant manager responded by telling Mr. Shultz the photo was disgusting, asking him to leave the store and complaining to the store manager. The assistant manager further asserted in her complaint that Mr. Shultz "is always saying sexual things. He makes me feel uncomfortable whenever I see him" and that "he is always inviting us to his camp, which is a nudist camp. He will tell us (girls outside) about what they do at his camp." This letter, too, was read into the record.

When Ms. Litteken contacted Ms. Kurtz on October 7, Ms. Litteken made it clear that the management firm was demanding Mr. Shultz's immediate removal, pursuant to its contract with Kurtz Construction. Ms. Litteken further indicated that the Sansone Corporation was concerned about its own exposure to financial liability based on Mr. Shultz's conduct. Sansone Corporation was concerned that more complaints could be forthcoming, given Mr. Shultz's contact with female personnel throughout the mall. For these reasons, Sansone Corporation was interested in handling the matter expeditiously and discretely.

Immediately after the telephone call from Ms. Litteken, Ms. Kurtz summoned Mr. Shultz to her office. As they discussed the matter, Ms. Kurtz received facsimiles of the written complaints. Ms. Kurtz provided Mr. Shultz with a copy of the complaints and explained to Mr. Shultz that she had no choice but to discharge him.

Mr. Shultz had made a habit of discussing his affiliation with a nudist camp with mall personnel. Ms. Kurtz and many mall merchants were generally aware of Mr. Shultz's affiliation with a nudist camp. Mr. Shultz admitted at the hearing that he did in fact tell a mall employee that she

needed "to get naked and get laid." Mr. Shultz admitted at the hearing that he did in fact present a nude photo of himself to a mall employee. Mr. Shultz was aware that women made up a majority of the mall personnel.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in this record establishes that Mr. Shultz was discharged for misconduct in connection with his employment. It does.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

Because Mr. Shultz was discharged, Kurtz Construction bears the burden of proving the discharge was for misconduct that would disqualify Mr. Kurtz from receiving unemployment benefits. See Iowa Code section 96.6(2). Mr. Shultz was not the victim of a misunderstanding, a misinterpretation, or an overreaction by a few overly sensitive females. On the contrary, Mr. Shultz engaged in a pattern of sexual harassment of mall employees. Mr. Shultz repeatedly and deliberately disregarded the standards of behavior his employer had every right to expect

of him. See 871 IAC 24.32-1-a; see also Henry v. Iowa Department of Job Service, 412 N.W.2d 731 (Iowa App. 1986).

The administrative law judge concludes that the employer has provided sufficient proof that Mr. Shultz was discharged for misconduct in connection with his employment. Mr. Shultz is disqualified from receiving unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount.

DECISION:

The representative's decision dated November 17, 2004, reference 01, is affirmed. Benefits are withheld until such time as the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided the claimant is otherwise eligible.

jt/smc