IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

STEVE C TETTER
Claimant

ABRH LLC
Employer

APPEAL NO: 14A-UI-09741-DWT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/03/14
Claimant: Appellant (2)

Iowa Code § 96.5(2)a - Discharge

PROCEDURAL STATEMENT OF THE CASE:

The claimant appealed a representative's August 26, 2014 determination (reference 01) that disqualified him from receiving benefits and held the employer's account exempt from charge because he had been discharged for disqualifying reasons. The claimant participated at the October 8 and 17 hearings with his attorney, Steven Stickle. Tim Colburn, a subpoenaed witness, participated at the October 17 hearing. Suzanne Bassler, an Equifax representative, appeared on the employer's behalf. Donna Johnson, the operations director, and Julie Perez, the manager, participated at the October 8 and 17 hearings. Kevan Morgan, an employee, testified at the October 8 hearing.

On September 23, a pre-hearing conference was held. Hearings for appeals 14A-UI-09144 and 14A-UI-09741 were consolidated and discovery issues were resolved. The parties agreed to the October 8 hearing date. During the hearings, Employer Exhibit One and Claimant Exhibits A and B were offered and admitted as evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge concludes the claimant is qualified to receive benefits.

ISSUE:

Did the employer discharge the claimant for reasons constituting work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on May 15, 2013. The employer hired the claimant to work as a full-time assistant manager. Julie Perez was the claimant's supervisor. The claimant understood the employer does not tolerate discrimination and harassment at work and an employee could be discharged if he violated the employer's anti-harassment policy. (Employer Exhibit One.)

On August 1, the claimant was talking to E.S. about some work-related issues when K.D. walked in on their discussion. When K.D. tried to get involved in his discussion with E.S., the claimant asked her to leave them alone. K.D. left, but she swore as she left.

Colburn worked as a cook on August 1. Between 2:30 and 3 p.m., Colburn saw C.M. put a cut-out picture of Uncle Ben from a stuffing box above the dishwasher. Morgan saw the cut-out picture and laughed. He considered this as someone's idea as a joke. The claimant did not post the cut-out picture. Colburn left work after the claimant. (Claimant Exhibit B.) The cut-out picture was not posted when the claimant left work. When Perez came to work the next morning, she saw the cut-out picture and asked the cooks at work if they knew anything about the cut-out picture. The cut-out then had writing that said, "My shit is always clean, cuz." The employees told Perez they had been told by C.M. that the claimant posted the cut-out picture.

Perez started asking people about the cut-out picture and if the claimant had done anything like this before. Based on Perez's questions, she understood from C.M. and M.C. the claimant put up the cut-out picture of Uncle Ben by the dishwasher. E.S. and K.D. also reported the claimant had made degrading and sexual comments to them on August 1. Perez contacted Johnson about the discrimination and harassment issues at work. Johnson advised Perez to contact the claimant so he would not come to work and Johnson investigated the allegations on Monday.

On August 2 or 3, Perez had the locks at the restaurant changed. Johnson started talking to employees on August 4 and 5. Johnson talked to the cook who worked the morning of August 2, Morgan, C.M., M.C., E.S. and K.D. She did not talk to the claimant before August 6 or to Colburn.

Monday evening, August 4, Morgan went to the claimant's home. The claimant understood Morgan did not believe he had anything to do with posting the cut-out picture, but employees were telling the employer that the claimant was responsible for posting the picture. The picture did not initially offend Morgan because he considered it as someone's idea of a joke. When the picture remained posted, as he had been told, this upset him because it was then no longer a joke and became offensive to Morgan.

Based on Johnson's discussions with several employees, she concluded the claimant was responsible for posting the cut-out picture of Uncle Ben that offended or could have offended employees. Even though the claimant's employment was not in jeopardy prior to August 1, and no one had complained about the claimant making any discriminating or harassing comment before, the employer discharged him on August 6 for harassing employees at work. (Claimant Exhibit A.)

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5(2)a. The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 665 (Iowa 2000).

The law defines misconduct as:

> 1. A deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment.
> 2. A deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees. Or
> 3. An intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer.

Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion do not amount to work-connected misconduct. 871 IAC 24.32(1)(a).

The employer discharged the claimant after concluding he posted the cut-out picture of Uncle Ben on August 1. The employer relied on hearsay information from employees who did not testify at the hearing. The claimant and Colburn testified the claimant had not posted the picture. Their testimony is credible and must be given more weight than the employee's reliance on hearsay information. Since the claimant did not post the cut-out picture and it was not up when he left work on August 1, the employer did not establish that the claimant committed work-connected misconduct. As of August 3, 2014, the claimant is qualified to receive benefits.

DECISION:

The representative's' August 26, 2014 determination (reference 01) is reversed. The employer discharged the claimant for reasons that do not constitute work-connected misconduct. As of August 3, 2014, the claimant is qualified to receive benefits, provided he meets all other eligibility requirements. The employer's account is subject to charge.

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Debra L. Wise
Administrative Law Judge

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Decision Dated and Mailed

dlw/pjs