

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHRISTIAN L BYERLY
Claimant

APPEAL NO. 10A-UI-05428-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DILLARD'S INC
Employer

**Original Claim: 07/26/09
Claimant: Respondent (2-R)**

Section 96.5(2)a – Discharge for Misconduct
Section 96.3(7) – Recovery of Overpayments

STATEMENT OF THE CASE:

Dillard's, Inc. filed an appeal from a representative's decision dated March 29, 2010, reference 03, which held that no disqualification would be imposed regarding Christian Byerly's separation from employment. After due notice was issued, a hearing was held by telephone on May 25, 2010. Mr. Byerly participated personally. The employer participated by Twila Sweet, Assistant Store Manager.

ISSUE:

At issue in this matter is whether Mr. Byerly was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

Having heard the testimony and having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Byerly was employed by Dillard's, Inc. from September 3, 2009 until March 5, 2010. He worked full-time as a dock associate. He was discharged because several of his associates indicated that they felt uncomfortable working with him.

On one occasion, a coworker returned from a funeral with gifts for other employees. Mr. Byerly said he had something for her and gestured towards his groin area. He asked another coworker if she was married or had a boyfriend; and when she said "no" to both, he said she must be a lesbian. He asked the coworker if she could have sex with a 43-year-old man. Mr. Byerly is age 43. He told a coworker that he wanted to be a sales associate and that it was her fault he was stuck on the dock because she had been on a leave of absence. As a result of the complaints, some of which were in writing, Mr. Byerly was discharged on March 5, 2010.

Mr. Byerly filed an additional claim for job insurance benefits effective March 7, 2010. He has received a total of \$3,090.00 in benefits since filing the claim.

REASONING AND CONCLUSIONS OF LAW:

An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Mr. Byerly was discharged because he made inappropriate comments that made his female coworkers uncomfortable working around him. If the complaint had come from only one coworker, the administrative law judge would not be inclined to give the employer's hearsay testimony more weight than Mr. Byerly's sworn denial. However, the fact that there were multiple complaints persuades the administrative law judge that the complaints were valid. Mr. Byerly could not identify any conflicts with his coworkers that might cause them to fabricate the complaints to the employer.

Mr. Byerly knew or should have known that making sexually suggestive remarks to coworkers was inappropriate in the workplace. His conduct had the potential of subjecting the employer to unwarranted claims of sexual harassment. His comments and inappropriate gestures constituted a substantial disregard of the standards the employer had the right to expect. Misconduct was alleged as the reason for discharge and misconduct has been established by the evidence. Accordingly, benefits are denied.

Mr. Byerly has received benefits since filing his additional claim effective March 7, 2010. Based on the decision herein, the benefits received now constitute an overpayment. As a general rule, an overpayment of job insurance benefits must be repaid. Iowa Code section 96.3(7). If the overpayment results from the reversal of an award of benefits based on an individual's separation from employment, it may be waived under certain circumstances. An overpayment will not be recovered from an individual if the employer did not participate in the fact-finding interview on which the award of benefits was based, provided there was no fraud or willful misrepresentation on the part of the individual. This matter shall be remanded to Claims to determine if benefits already received will have to be repaid.

DECISION:

The representative's decision dated March 29, 2010, reference 03, is hereby reversed. Mr. Byerly was discharged by Dillard's, Inc. for misconduct. Benefits are denied until he has worked in and been paid wages for insured work equal to ten times his weekly job insurance benefit amount, provided he is otherwise eligible. This matter is remanded to Claims to determine the amount of any overpayment and whether Mr. Byerly will be required to repay benefits.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/kjw