

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DANNY D LAMB
Claimant

ADVANCE SERVICES INC
Employer

APPEAL 16A-UI-07991-LJ-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 06/19/16
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the July 18, 2016, (reference 01) unemployment insurance decision that denied benefits based upon a determination that claimant was discharged for conduct not in the best interest of his employer. The parties were properly notified of the hearing. A telephone hearing was held on August 8, 2016. The claimant, Danny D. Lamb, participated. The employer, Advance Services, Inc., participated through Melissa Lewien, risk manager. Employer's Exhibits 1 through 6 were received and admitted into the record without objection.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a visual inspector from April 6 or 7, 2015, until this employment ended on June 22, 2016, when he was discharged for sexual harassment.

On June 22, 2016, claimant slapped his coworker, Lacy Pond, on the backside. (Exhibit 4) He began to do this a second time, and Pond told him not to. Claimant then punched her on the backside. Pond reported this to both the jobsite and the employer. Human Resources Coordinator Jamie Shore reached out to claimant and told him that he was discharged. Claimant testified that no one would give him any information about why he was discharged other than telling him it was because someone "made a statement" against him. During this conversation, claimant inquired why he would try and touch Pond, as Pond is his cousin. (Exhibit 2, page 2) At that time, no one had told claimant that Pond was the person who complained about him. Approximately twenty minutes after this conversation, claimant called Human Resources Assistant Manager Katie Purdy and reported that he wanted to file harassment charges against Pond. (Exhibit 2, page 2) Claimant asked why he would slap Pond on the backside or punch her in the arm. Claimant testified that he learned he was discharged because of Pond's allegations approximately 90 minutes after he was discharged, when his coworkers spoke to him.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for disqualifying job-related misconduct. Benefits are withheld.

Iowa Code § 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.

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).

Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986).

The determination in this case rests in part on the credibility of the parties. 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 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.*

After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the employer's version of events more credible than claimant's version of events. While the employer did not present Pond or Shore to provide sworn testimony or submit to cross-examination, the combination of Pond's written statement and Shore's emails with Purdy combined with Lewien's testimony, when compared to claimant's recollection of the event, establish the employer's evidence as credible. The administrative law judge believes claimant slapped Pond on the backside on June 22, 2016.

The employer is entitled to establish reasonable work rules and expect employees to abide by them. Here, the employer has established that claimant was discharged for inappropriate physical contact with his coworker. This is misconduct even without prior warning. Benefits are withheld.

DECISION:

The July 18, 2016, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Elizabeth Johnson
Administrative Law Judge

Decision Dated and Mailed

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