

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MACKENZIE J FINCH
Claimant

APPEAL NO: 13A-UI-07151-DWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

VON MAUR INC
Employer

OC: 05/19/13
Claimant: Respondent (1)

Iowa Code § 96.5(2)a - Discharge

PROCEDURAL STATEMENT OF THE CASE:

The employer appealed a representative's June 5, 2013 determination (reference 01) that held the claimant qualified to receive benefits and the employer's account subject to charge because she had been discharged for nondisqualifying reasons. The claimant participated in the hearing with her subpoenaed witness, Heather Behrens. Kayla Snavey, the distribution center manager, and Hollie Sutton appeared on the employer's behalf. 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 in April 2012 as a full-time merchandise processor. The employer's anti-harassment policy informs employees they are prohibited from harassing others based on race and sexual orientation. The employer considers harassment to include negative stereotyping, degrading jokes and any comment that creates an intimidating, hostile or offensive work environment.

On May 17, 2013, an employee who started working on March 31 reported the claimant made offensive racial and sexually orientated comments to her. The employee incorrectly believed the claimant told everyone else that she had a girlfriend. The claimant did not think anything about the employee's sexual orientation because another employee the claimant knew had recently broken up with a girlfriend. The new employee also was offended when the claimant asked if she thought a visitor walking through the facility was cute and then said, "I forgot you are gay." When the claimant talked to the employee, she had no idea she was offended by anything the claimant said.

The new employee did not say anything to the employer until employees talked about her parents. She was bi-racial and another employee made an inappropriate comment about how the employee was conceived. During the conversation, the new employee did not appear to be offended or upset.

When the employer talked to the claimant on May 19, she acknowledged that in retrospect a person could be offended by the reported comments. The claimant said she had not intentionally said anything to offend the employee. The claimant had already received her final written warning for attendance and production issues. Even though the employer had not previously addressed any harassment issues, the next disciplinary step was termination after a final written warning. The employer discharged the claimant on May 20 for making inappropriate racial and sexually orientated comments to another employee who considered them offensive.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges her 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 claimant used poor judgment when she asked a new employee if she thought a visitor was cute and then commented that she forgot the employee was gay. When the new employee told the claimant about her sexual orientation, the claimant made some incorrect assumptions. The employee did not tell the claimant that any of her comments offended her. The employee did not report any problems until there was a discussion about the race of her parents. Another employee made an inappropriate comment about how the employee was conceived, but the claimant was present and part of the group talking about this when the comment was made. The claimant used poor judgment when she did not immediately realize the employee had been offended by another employee's comment.

The employer discharged the claimant for justifiable business reasons after an employee reported the claimant had harassed her by making racial and sexually orientated offensive comments. The evidence establishes the claimant had not realized any of her comments offended the other employee. The claimant did not intentionally or substantially violate the employer's harassment policy. The claimant did not commit work-connected misconduct. As of May 19, 2013, the claimant is qualified to receive benefits.

DECISION:

The representative's June 5, 2013 determination (reference 01) is affirmed. The employer discharged the claimant for business reasons that do not constitute work-connected misconduct. As of May 19, 2013, the claimant is qualified to receive benefits, provided she meets all other eligibility requirements. The employer's account is subject to charge.

Debra L. Wise
Administrative Law Judge

Decision Dated and Mailed

dlw/pjs