

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MICHAEL B WAYBILL
Claimant

APPEAL NO. 11A-UI-05080-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FAREWAY STORES INC
Employer

OC: 03/20/11
Claimant: Respondent (2-R)

Section 96.5-2-a – Discharge
Section 96.3-7 – Benefit Overpayment

STATEMENT OF THE CASE:

Employer filed a timely appeal from a representative's decision dated April 11, 2011, reference 01, which held claimant eligible to receive unemployment insurance benefits finding that the claimant's dismissal was not for a current act of misconduct. After due notice, a telephone hearing was held on May 12, 2011. Although Mr. Waybill provided a telephone number, he did not answer when repeatedly called. The employer participated by Mr. Garrett Piklapp, General Counsel, and witness, Douglas Cosgrove, Manager. Employer's Exhibits 1 through 18 were received into evidence.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered all of the evidence in the record, the administrative law judge finds: Michael Waybill was employed by Fareway Stores, Inc. from October 20, 2008 until March 22, 2011 when he was discharged from employment. Mr. Waybill worked as a full-time store clerk and was paid by the hour. His immediate supervisor was the store manager, Doug Cosgrove.

Mr. Waybill was discharged on March 22, 2011 based upon a complaint that was made by another employee on March 19, 2011 about the claimant's conduct on March 13, 2011. On that date, Mr. Waybill made a patently inappropriate demeaning sexual statement about the other employee's girlfriend causing the male employee to become very agitated and angry and causing him to issue an official complaint about Mr. Waybill's conduct. Mr. Waybill had been specifically warned one month earlier on February 19, 2011 about making sexual comments and was aware that his employment was in jeopardy. The claimant had previously been issued numerous disciplinary actions for violation of work policies, his demeanor and comments of a sexual nature made to other employees.

Based upon the patently inappropriate sexually demeaning comment made by the claimant after being warned previously, a decision was made to terminate Mr. Waybill from his employment.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes a current act of misconduct sufficient to warrant the denial of unemployment insurance benefits. It does.

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.

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.

The evidence in the record establishes that the claimant was discharged on March 22, 2011 based upon an incident that took place on March 13, 2011 that the employer became aware of on March 19, 2011. Upon being informed by another worker that Mr. Waybill had again made a sexually demeaning and inappropriate statement at work to another employee, the employer acted immediately to investigate and to discharge the claimant from employment. The evidence in the record establishes that Mr. Waybill had been warned repeatedly for numerous violations of company policy and had been warned at least on two previous occasions for making inappropriate sexual comments to employees. The claimant's final warning on that subject occurred one month prior to his discharge.

The administrative law judge finds that the claimant was discharged for a current act of misconduct sufficient to warrant the denial of unemployment insurance benefits. Benefits are withheld.

Iowa Code § 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

DECISION:

The representative's decision dated April 11, 2011, reference 01, is reversed. Claimant is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount and meets all other eligibility requirements of Iowa law. The issue of whether the claimant must unemployment insurance benefits is remanded to the UIS Division for determination.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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