

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

MICHAEL G HYMES
Claimant

APPEAL NO. 18A-UI-12281-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING COMPANY
Employer

**OC: 11/25/18
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Casey's Marketing Company (employer) appealed a representative's December 14, 2018, decision (reference 01) that concluded Michael Hymes (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for January 11, 2019. The claimant participated personally. The employer participated by Rose Rocha, Area Supervisor. Exhibit D-1 was received into evidence. The employer offered and Exhibit 1 was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on June 21, 2018, as a store employee. At the end of his employment, he was working full-time hours. He signed for receipt of the employer's handbook when he was hired. The employer has a policy which states, "Any act or threat of violence, intimidation or harassment, toward people or property will not be tolerated." Employees regularly used profanity in the kitchen out of the hearing range of customers.

The claimant's former girlfriend and her current boyfriend were co-workers. The boyfriend winked at the claimant and blew him kisses. Sometimes the boyfriend would grab his genitalia and look at the claimant. The claimant spoke with the former girlfriend and asked her to speak with him about stopping the behavior. She did not. The claimant complained to his manager and the area supervisor about the harassment. They told the claimant he was an adult and should be able to work with them. His manager and area supervisor denied his request for transfer.

On November 26, 2018, the claimant decided to talk to the boyfriend in the kitchen. He asked if they could speak somewhere else so the conversation could be private. The boyfriend refused. The claimant said that he had talked to the girlfriend, the manager, and the area supervisor.

Now he was asking the boyfriend to stop the behavior. The claimant told the boyfriend to leave him the fuck alone and went back to work. The manager did not see the interaction.

The boyfriend and girlfriend complained that the claimant threatened the boyfriend. The girlfriend's written statement indicated that the claimant said, "he would wreck his shit". The employer did not have a statement from the boyfriend. It did not take a statement from the claimant. On November 26, 2018, the manager terminated the claimant for being rude, argumentative, hostile, and using profanity.

The manager no longer works for the company. The area supervisor never saw the claimant behave inappropriately at work.

The claimant filed for unemployment insurance benefits with an effective date of November 25, 2018. The employer participated personally at the fact finding interview on December 11, 2018, by Marlene McKee, an Equifax representative. She had no specific information about the final incident for which the claimant was discharged.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). In this case, the claimant would not have known that his conduct would have warranted discharge because other employees engaged in the same type of behavior without termination. Profanity in the kitchen was allowed. The boyfriend's harassment of the claimant was allowed. The claimant complained about the boyfriend and asked for a transfer. The employer did not mediate the situation or reprimand the employee who was causing problems. It told the claimant to act like a grown up. Acting maturely, the claimant approached the employee and asked him to stop. He was rewarded with a termination.

Even if the employer thought the claimant harassed an employee, there was disparate treatment among employees and the employer selected the claimant for discharge. The employer did not provide sufficient evidence of job-related misconduct. It did not meet its burden of proof to show misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's December 14, 2018, decision (reference 01) is affirmed. The employer has not met its burden of proof to establish job-related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/rvs