

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ROBERT J ROTH
Claimant

APPEAL NO. 17A-UI-02240-TNT

**ADMINISTRATIVE LAW JUDGE
DECISION**

IOWA MENNONITE BENEVOLENT ASSN
Employer

OC: 01/22/17
Claimant: Respondent (2)

Iowa Code § 96.5(2)a - Discharge
Iowa Code § 96.3(7) – Benefit Over-Payment

STATEMENT OF THE CASE:

Iowa Mennonite Benevolent Association DBA Pleasantview Home, filed an appeal from a representative's decision dated February 16, 2017, reference 01, which held claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held on March 21, 2017. Claimant participated. The employer participated by Ms. Karen Schrock, Human Resource Manager, Mr. Rick Surly, Dietary Manager, and Mr. Jorge Torres, Dietary Aid. Employer's Exhibits A through E were admitted into the hearing record.

ISSUE:

The issue is whether the claimant was discharged for misconduct and whether the claimant has been overpaid unemployment insurance benefits.

FINDINGS OF FACT:

Having considered all of the evidence in the record, the administrative law judge finds: Robert Roth was employed by the Iowa Mennonite Benevolent Association DBA Pleasantview Home from May 7, 2015 until January 18, 2017 when he was discharged from employment. Mr. Roth was employed as a full-time Dietary Aide and was paid by the hour. His immediate supervisor was Rick Surly.

Mr. Roth was discharged on January 18, 2017, following an incident that day during which Mr. Roth had called Mr. Torres a sexually derogatory name in Spanish and had continued to harass Mr. Torres by hitting him on the back and buttocks by snapping a towel. While Mr. Torres had repeatedly asked Mr. Roth to stop, the claimant had continued the conduct. The incident was witnessed by Carolyn Lucas. Later that day, Mr. Torres complained to company management about Mr. Roth's behavior and threatened to quit his employment over the issue.

The claimant's supervisor independently took statements from Mr. Torres and from Ms. Lucas about the matter and questioned Mr. Roth as well. The employer determined that Mr. Roth was familiar with the meaning of the derogatory Spanish term he had directed toward Mr. Torres.

The employer concluded that Mr. Roth had continued to agitate and provoke Mr. Torres although he had been repeatedly requested to stop.

Mr. Roth had been given a number of verbal warnings by the employer about his demeanor at work. Mr. Roth had been specifically warned on January 10, 2017 to display a more even demeanor at work and to avoid any conduct in the future that might be considered to be annoying. (See Employer's Exhibit A).

The decision was made to terminate Mr. Roth because the other employee, Mr. Torres, and a third party witness both independently verified that Mr. Roth's conduct was unprovoked by Mr. Torres and that the claimant had continued to harass Mr. Torres even though Mr. Torres repeatedly asked him to stop. The employer also considered that the claimant had received a written warning for similar behavior only eight days prior.

It is Mr. Roth's position that he was only engaging in playful behavior with Mr. Torres and that he did not understand the meaning of the Spanish word that he had used, although he and Mr. Torres had regularly referred to each other by the same Spanish word.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes misconduct on the part of the claimant 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.

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).

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See *Lee v. Employment Appeal Board*, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

In the case at hand, the evidence establishes that Mr. Roth had violated not only the warning that had been issued to him eight days before, but also violated the employer's reasonable expectations by engaging in harassing conduct towards a fellow employee and directing a derogatory Spanish term towards the employee while doing so.

Prior to discharging the claimant, the employer established, through an independent witness, that Mr. Roth was the aggressor in the matter and that Mr. Roth would not discontinue his harassing behavior even though Mr. Torres had repeatedly asked him to stop.

The administrative law judge concludes that the claimant was sufficiently placed on notice by prior warning and by the employer's employee handbook that harassing of employees or using obscene or abusive or threatening language was unacceptable and could warrant disciplinary action up to and including termination.

Mr. Roth had been placed on notice eight days before to stop engaging in conduct that other employees might find harassing. Although placed on notice, Mr. Roth intentionally engaged in behavior on January 18, 2017, by calling another employee a derogatory term and repeatedly snapping the employee on the back and buttocks with a towel while the other employee pleaded for Mr. Roth to stop. The credible evidence establishes that the claimant's conduct was not mutual banter or horseplay, but one-sided on the part of Mr. Roth. The administrative law judge concludes that the claimant's actions were intentional because he continued to act in an unacceptable manner, even though Mr. Torres repeatedly indicated that the claimant's conduct was unacceptable and asked him to stop. Based upon the employer's policy, the recent warning that had been served upon the claimant, and the final incident, the administrative law judge concludes that the employer sustained its burden of proof in establishing that Mr. Roth's discharge from employment took place under disqualifying conditions.

Accordingly, the claimant is disqualified for unemployment insurance benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount and is otherwise eligible.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. The administrative record reflects that the claimant received unemployment insurance benefits in the amount of \$2,046.00 since filing a claim with an effective date of January 22, 2017 for the benefit weeks ending January 28, 2017 through April 8, 2017. The administrative record also establishes that the employer did participate in the fact-finding interview.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code section 96.3(7)a, b.

The claimant received benefits but is now denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits.

Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

DECISION:

The representative's decision dated February 16, 2017, reference 01, is reversed. The claimant was discharged for misconduct in connection with his work. 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 is otherwise eligible. Claimant has been overpaid unemployment insurance benefits in the amount of \$2,046.00 and is liable to re-pay this amount. The employer's account shall not be charged based upon the employer's participation in the fact-finding.

Terry P. Nice
Administrative Law Judge

Decision Dated and Mailed

scn/rvs