

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**BYRON C. WILLINGHAM**  
Claimant

**APPEAL NO. 10A-UI-08950-VST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WEAVER ENTERPRISES LTD**  
Employer

**OC: 08/23/09**  
**Claimant: Appellant (2)**

Section 96.5-2-A -- Misconduct

**STATEMENT OF THE CASE:**

Claimant filed an appeal from a decision of a representative dated June 10, 2010, reference 03, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on August 9, 2010. Claimant participated. Charles Davis was a witness for the claimant. Employer participated by Terry Moffitt, Director of Operations. The record consists of the testimony of Terry Moffitt; the testimony of Byron Willingham; and the testimony of Charles Davis.

**ISSUE:**

Whether the claimant was discharged for misconduct.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer holds a franchise for and operates a Kentucky Fried Chicken restaurant in Waterloo, Iowa. The claimant was hired on September 13, 2008, as a part-time crew member. He was terminated on February 25, 2010, for what the employer believed to have been vulgar and sexual advances to another employee.

This female employee had given the claimant a ride home from work a few days prior to his termination. Charles Davis, a friend of the claimant, was also in the car. Mr. Davis was dropped off and then the claimant and the female employee proceeded to his apartment building. The claimant asked the female employee if she would like to come upstairs. She said no. He asked her if she had a boyfriend and she said that she did. She then asked him for his phone number and put it in her phone. She then made a complaint to the employer that she was uncomfortable working around the claimant. The claimant was terminated. The employer has a zero tolerance for sexual harassment. This policy is set forth in writing in the employee handbook.

## REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 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.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Sexual harassment of a co-employee could constitute misconduct. An employer could reasonably expect that an employee would not make vulgar and sexual advances toward another employee. The employer has the burden of proof to show misconduct.

There is insufficient evidence in this record to establish misconduct. The claimant denied making any vulgar or sexually inappropriate statements to a female employee. There was a conversation between the claimant and the female employee at the time she dropped the claimant off at his apartment building. The claimant admitted to asking her if she wanted to come upstairs and if she had a boyfriend. These statements are not, in and of themselves, vulgar. Although the claimant's friend, Charles Davis, was not present when these comments were made, he described the prior conversation in the car as friendly. The female employee did not testify at the hearing. Ms. Moffitt did not have any information on what exactly the claimant is supposed to have said that caused the claimant to complain and lead to his termination. The employer's evidence is hearsay in nature.

Findings must be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs. Iowa Code Sec. 17A.14(1). Allegations of misconduct 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. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The Iowa Court of Appeals set forth a methodology for making the determination as to whether hearsay rises to the level of substantial evidence. In Schmitz v. Iowa Department of Human Services, 461 N.W.2d 603, 607-608 (Iowa App. 1990), the Court required evaluation of the "quality and quantity of the [hearsay] evidence to see whether it rises to the necessary levels of trustworthiness, credibility and accuracy required by a reasonably prudent person in the conduct of their affairs." To perform this evaluation, the Court developed a five-point test, requiring agencies to employ a "common sense evaluation of 91) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better evidence; (4) the need for precision; (5) the administrative policy to be fulfilled." Id. At 608.

Neither the manager who terminated the claimant nor the female employee who made the complaint testified at the hearing. The claimant denied having made any sexually inappropriate statements or advances. The administrative law judge had no way to judge the credibility of the witnesses or weigh their testimony. Misconduct cannot be established given the state of the record. Accordingly, benefits are allowed if the claimant is otherwise eligible.

**DECISION:**

The decision of the representative dated June 10, 2010, reference 03, is reversed. Unemployment insurance benefits are allowed provided claimant is otherwise eligible.

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Vicki L. Seeck  
Administrative Law Judge

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Decision Dated and Mailed

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