

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**PAMELA DESIMONE**  
Claimant

**APPEAL NO. 09A-UI-11703-CT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**BIOTECH X-RAY INC**  
Employer

**OC: 07/05/09**  
**Claimant: Appellant (1)**

Section 96.5(2)a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Pamela Desimone filed an appeal from a representative's decision dated August 5, 2009, reference 01, which denied benefits based on her separation from Biotech X-Ray, Inc. After due notice was issued, a hearing was held by telephone on August 31, 2009. Ms. Desimone participated personally. The employer participated by Catherine Bergman, Account Manager; Kathy Klos, Supervisor; and Tamara Schwartz, President.

**ISSUE:**

At issue in this matter is whether Ms. Desimone was separated from employment for any disqualifying reason.

**FINDINGS OF FACT:**

Having heard the testimony and having reviewed all of the evidence in the record, the administrative law judge finds: Ms. Desimone was employed by Biotech X-Ray, Inc. from February 28, 2008 until July 2, 2009 as a full-time radiologic technologist. She travelled to various sites performing x-ray services on behalf of the employer. She was discharged from the employment. The final incident that prompted the discharge was a complaint from a customer that Ms. Desimone had questioned a staff member as to whether he was "gay." She acknowledged asking the question but did not feel it would be offensive.

In making the decision to discharge, the employer also considered other past acts for which Ms. Desimone had been warned. She received a verbal warning on November 24, 2008 because she missed an exam after she erased the employer's message from her voice mail. She received another verbal warning on May 29, 2009 after she declined to perform an exam. She was expected to from work from 9:00 a.m. until 5:00 p.m. and received the order between 2:00 and 2:30 p.m.

Ms. Desimone received a written warning on June 19, 2009 because she delayed an examination. She delayed the exam from June 19 until the following Monday when it could have been performed the next day, a Saturday. She indicated she did not know where weekend services were available. She also delayed an exam on June 22 without a supervisor's

permission. She indicated she did not feel it was a big deal to delay the exam by one day. As a result of the delay, she received another written warning.

**REASONING AND CONCLUSIONS OF LAW:**

An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). For reasons that follow, the administrative law judge concludes that disqualifying misconduct has been established. Ms. Desimone's conduct in delaying appointments represented only minor lapses in judgment and not intentional acts of misconduct. However, her question to the staff person regarding his sexual preference is sufficient, standing alone, to constitute misconduct.

This might well be a different case if Ms. Desimone had questioned a coworker regarding sexual preference. However, the question was asked of an individual who worked for her employer's customer. The employer had the right to expect her to act in a professional manner when conducting business on its behalf. The employer had the right to expect that her questions and conversations would be limited to work-related matters. She knew or should have known that asking an individual if he was "gay" might be offensive and might affect her employer's business relationship. It is concluded that her conduct constituted a substantial disregard of the standards the employer had the right to expect. It is concluded, therefore, that disqualifying misconduct has been established and benefits are denied.

**DECISION:**

The representative's decision dated August 5, 2009, reference 01, is hereby affirmed. Ms. Desimone was discharged for misconduct in connection with her employment. Benefits are denied until she has worked in and been paid wages for insured work equal to ten times her weekly job insurance benefit amount, provided she is otherwise eligible.

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Carolyn F. Coleman  
Administrative Law Judge

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Decision Dated and Mailed

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