

BEFORE THE IOWA BOARD OF MORTUARY SCIENCE

IN THE MATTER OF:)	CASE NO. MS 07-010
)	DIA NO. 09DPHMS001
MARK KESSLER, F.D.)	
License No. 02202)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
Respondent)	DECISION AND ORDER

On June 11, 2009, the Iowa Board of Mortuary Science (Board) filed a Notice of Hearing and Statement of Charges against Mark Reed Kessler, F.D. (Respondent) charging him with unethical conduct and practices harmful or detrimental to the public. The charges further alleged that while acting as a preceptor, Respondent engaged in unethical behavior by creating an unprofessional working environment in which an intern was subjected to offensive and improper remarks and conduct. On July 14, 2009, Respondent filed an Answer denying all of the allegations.

The hearing was held on September 10, 2009 at 11:00 a.m. in the fifth floor conference room, Lucas State Office Building, Des Moines, Iowa. The following members of the Board were present for the hearing: Margaret Eicher, F.D., Chairperson; LuJean Welander, F.D.; Tyrone Orr, F.D.; Martin Mitchell, F.D.; Bradley Hawn, F.D.; Paul Johnson and Judy McClure, public members. Administrative Law Judge Margaret LaMarche assisted the Board in conducting the hearing. Assistant Attorney General Pamela Griebel appeared for the state. Attorney Julie Schumacher represented Respondent. The testimony was recorded by a certified court reporter. The hearing was closed to the public at Respondent's request, pursuant to Iowa Code section 272C.6(1)(2009).

After hearing the testimony and examining the exhibits, the Board convened in closed executive session, pursuant to Iowa Code section 21.5(1)(f)(2009) to deliberate its decision. The administrative law judge was directed to draft the Board's decision, in conformance with their deliberations.

THE RECORD

The record includes the testimony of the witnesses and Exhibits 1-7 (See Index for description).

FINDINGS OF FACT

1. On October 8, 1980, Mark Reed Kessler (Respondent) was issued license number 02202 to practice as a funeral director in the state of Iowa. Respondent has been employed by Kessler Funeral Homes Inc. since 1984. Donna Kessler, who is Respondent's mother, is the major shareholder of the trust that currently owns the funeral home, but she is not a licensed funeral director or embalmer. Respondent's license has never been sanctioned by the Board. Two licensed funeral directors who have previously worked with Respondent described him as a skilled and professional funeral director and an excellent preceptor. Neither has witnessed any unethical or unprofessional conduct by Respondent. (Testimony of Respondent; MR, F.D.; TR, F.D.; Exhibit 7)

2. TS graduated from the Mortuary Science program at Kansas City, Kansas Community College in July 2000. (Exhibit 4) After her fourth child was born in December 2003, TS began looking for a mortuary science internship in Iowa to be closer to her family in Council Bluffs and arranged an employment interview with Respondent at Kessler Funeral Home. TS is not married and at the interview Respondent asked her some personal questions about her marital status and the paternity of her four children. TS did not want to offend Respondent so she initially told Respondent that she had a boyfriend who was a truck driver, and she introduced her female partner as her nanny. (Testimony of TS; Exhibit 2, p. 5; Exhibit 3, p. 8)

Respondent later told the Board's investigator that TS came to the interview dressed in dirty clothes and a sweatshirt with holes, that he was not impressed with her at the time of the interview, and that he hired her out of fear of being sued after she called him that evening and said "you're not going to hire me because I'm a lesbian, are you?" (Exhibit 3, pp .8-9) At hearing, however, Respondent claimed that he always knew that TS was homosexual and had already decided to hire her before she called him that evening because he wanted to help her realize her dream of being a funeral director. (Testimony of Respondent) Respondent's inconsistent and self-serving statements diminished his credibility.

3. TS began working at the Kessler Funeral Home on August 23, 2004. At first, she only performed secretarial and support tasks because she had not yet passed all of her boards. On June 9, 2005, TS started her one year internship with Respondent as her preceptor. (Exhibit 4; Testimony of TS; Respondent)

4. Interns file six month and final internship reports with the Board. On her six month intern report, TS commented that the process could be improved if the intern could visit privately with someone on the Board. Board member RO was very involved in the internship/preceptor program, and she called TS to follow up on this comment. TS told RO that she was very concerned that some of Respondent's practices at the Kessler Funeral Home were illegal. Those complaints are not at issue in this proceeding.

TS further reported that she was being verbally and sexually harassed at work and that the brunt of the comments concerned her homosexuality. TS also told RO that she feared for her own safety and the safety of her family but that she needed the job to support her family. RO advised TS that in order for the Board to take any action, TS would have to file a complaint and that she (RO) would have to recuse herself from any proceedings. RO also warned TS that if she did not file a report with the Board her own license could be in jeopardy. (Exhibit 5; Testimony of RO; TS)

5. TS had additional conversations with RO during her internship and on one occasion she went to RO's funeral home to speak to her in person because she was afraid that her telephone conversations were monitored. TS continued to complain about Respondent and his treatment of employees. (Testimony of RO; Exhibit 5)

TS also complained about Respondent's behavior to Donna Kessler, Respondent's mother. However, Donna Kessler told her that he was that way with everyone and she should just ignore him. (Exhibit 2, p. 6) TS continued to work for Respondent without filing a written complaint. She completed her internship on June 9, 2006 and later quit her employment at the Kessler Funeral Home on August 4, 2006. (Testimony of TS; Exhibits 4, 2)

6. The following persons also worked at Kessler Funeral Homes at the same time as TS:

a) ME was hired by Kessler Funeral Homes as a full-time receptionist in 2003 and she worked in an upstairs office that she later shared with TS. ME quit on August 4, 2006, which was the same day that TS quit.

b) TB began working for Kessler Funeral Homes in 2001 while he was still in high school, primarily washing cars and mowing the lawn. He continued to work there part-time while attending college and completing a mortuary science program. At the time of the hearing, he had completed ten months of his one-year internship with Respondent as his preceptor. He hopes to continue working for Kessler Funeral Homes after he is a licensed funeral director.

c) DM was employed by Respondent from the fall of 2004 until February 2008. He primarily performed outside yard work and vehicle maintenance, although he also assisted Respondent in removing bodies. DM is currently working in farming but continues to work part-time as a grave digger for Kessler Funeral Homes.

d) MR, F.D. currently owns and operates his own funeral home but has provided funeral director services for Kessler Funeral Homes when Respondent is unavailable or on vacation. MR was previously employed by Kessler Funeral Homes in 1999-2000 and finished his mortuary science internship under Respondent. He described Respondent as an excellent preceptor and described his work experience at Kessler Funeral Homes as the best job he ever had as a funeral director.

(Exhibit 3, pp. 10, 12, 17; Testimony of ME; TB; MR, F.D.; TS; Respondent)

7. When TS filed her written complaint with the Board on June 8, 2007, she attached a four-page written statement that she prepared in August 2006 for her unemployment benefits appeal. She also attached a statement that she wrote on September 28, 2006 to support Respondent's wife's application for a no contact order. TS apologized for the delay in filing her complaint with the Board and stated that she was very scared and fearful for the safety of her kids and her family. (Exhibit 2; Testimony of TS)

a. In her unemployment benefits appeal, TS had claimed that Respondent subjected her to verbal, emotional, mental and physical abuse, harassment and discrimination. In summary, TS claimed that Respondent:

- called her various insulting names that included, in part: "bitch, fucking bitch, dyke, carpet muncher, smoochy, hillbilly, white trash, trailer trash";
- called her children insulting names and made inappropriate references to her children;
- appeared at her home drunk on several occasions and made inappropriate comments;
- threw things at her, including newspapers, tent stakes, and a dirty washcloth after using it in the shower;
- yelled and criticized her almost daily even when she followed his directions to the letter;
- drank while working and kept a beer keg at the funeral home;
- made inappropriate sexual comments to her;
- required her to work excessive hours without an established schedule; and
- did not give her benefits he had promised.

TS reported that she felt intimidated by Respondent and was afraid to challenge his authority. She stated that she could not afford to lose her apprenticeship or her job because she needed them to obtain her license and support her family. She was afraid that Respondent would make sure she never worked in another funeral home if she reported him because he had previously served as the president of the Iowa Funeral Director's Association. TS was eventually granted unemployment benefits following two appeals. (Testimony of TS; Exhibit 2, pp. 5-8)

b. In her September 28, 2006 letter, TS asserted that Respondent:

- repeatedly made comments to her, DM, and TB describing how he could kill his wife and get away with it and that DM agreed he would help Respondent conceal her body; and
- twice sent her to look at guns offered for sale through an estate after telling her that he wanted to kill his wife if she gave him any trouble with the divorce or her bankruptcy.

TS reported this information to Connie Kessler after she quit her job on August 4, 2006. (Testimony of TS; Exhibit 2, pp. 3-4) The court did not grant Connie Kessler's request for a no contact order. (Testimony of Respondent).

8. Respondent admitted that he and others called TS by the nickname of "Smoochy" but denied calling her any other names or making inappropriate remarks to her. Respondent claimed that it was TS who spoke "like a trucker" and used "graphic" language. [REDACTED]

[REDACTED] TS also admitted that she sometimes participated in inappropriate language and sexual joking in the workplace to alleviate the stress of the situation but denied that she was the instigator. TS's prior consistent statements, her testimony, her demeanor at hearing, and the corroborating testimony of her co-worker, ME, persuaded the Board that Respondent made repeated insulting, lewd, and improper remarks to TS throughout her employment. These remarks included:

- Inappropriate inquiries and comments about TS's sexual orientation and sexual activity;
- Inappropriate and demeaning name calling; and
- Lewd comments concerning sexual acts and implied requests for sexual acts.

TS gave detailed and specific statements and testimony about the names that Respondent called her and the inappropriate remarks that he made to her. Her co-worker, ME, was a very credible witness and provided important corroboration concerning the name calling and some of the lewd comments. Although ME also had her own complaints concerning her employment, the Board did not believe that she would fabricate these types of allegations against Respondent.

On the other hand, Respondent has given inconsistent statements when asked about TS's allegations of name calling. On direct examination, Respondent testified that he never called TS a "dyke" or a "bitch." When asked if his own nickname at work was "asshole," Respondent replied that TS may have called him that behind his back, but he did not think that others called him that. (Testimony of Respondent) However, in his interview by the DIA investigator, Respondent stated that TS often called him an "ass whole" and he would retort, "better than being a bitch." He told the investigator that it was all in fun and he didn't see the harm. (Exhibit 3, p. 7) Respondent was unable to provide a reasonable explanation for this significant discrepancy in his statements.

TB testified that Respondent did not make offensive remarks or engage in offensive conduct, but this testimony was not persuasive. As a current employee and intern at Kessler Funeral Homes, TB has a personal interest in protecting Respondent and his professional license. He has been mentored and influenced by Respondent since he was an impressionable teenager. TB was uninformed and confused about what constitutes appropriate professional behavior and boundaries in the workplace. The Board was dismayed when TB testified that he would not be personally offended if a preceptor dropped something on the floor and asked an intern to pick the item up and perform a certain sexual act "while she was down there," which is one of the allegations in this case. TB suggested that whether or not such a remark was offensive or inappropriate depended on whether it was made in a joking or a serious manner. It appeared that TB was struggling to provide responses that would not incriminate Respondent. (Testimony of TS; Respondent; ME; TB; Exhibits 2, 3)

9. Respondent admits that he had frustrations with his divorce but denies that he ever threatened to kill his wife. In his interview with a DIA investigator, Respondent stated that his ex-wife was heavily in debt and causing him lots of trouble but he would never have seriously thought about murdering her. Respondent recalled a conversation when one of his employees made the comment, "If I were you, I'd kill her and bury her under one of the vaults." At the time of that interview, he could not recall which employee made the comment. (Exhibit 3, p. 6)

At the hearing, Respondent initially claimed that it was TS who made the reported comment "If I were you, I'd kill her..." Later on cross-examination, Respondent testified that it was probably DM, who was not called as a witness, who made the comment. He claimed the comment was made in the context of their discussion of a Florida funeral home director who had killed his wife and put her body under a vault. Respondent admitted that TS may have heard this discussion. He also admitted that he sent TS to look at guns for him but contended that he did so only as a courtesy to the widow and had no real intention of purchasing a gun. However, he did not claim that he communicated his lack of interest in the guns to TS. (Testimony of Respondent)

10. It is undisputed that Respondent kept a beer keg in the basement of the funeral home near the preparation room and that Respondent and his male employees drank beer at the funeral home. TS and ME testified that Respondent

and his male employees drank excessively and drank in all areas of the funeral home, while Respondent and his male employees denied drinking while they were working or outside of Respondent's living quarters. Respondent testified that he never drank more than 1 or 2 beers if he was on call and never has more than 2 or 3 beers even if he is out with friends. (Testimony of Respondent; TB; TS, ME; Exhibit 3, pp. 7, 10, 12-14, 16, 17)

TB denied that he ever saw Respondent intoxicated, either at home or when working. However, TB also described intoxication as when a person is "not able to walk or talk very good," and further testified that he believes that a person can be legally intoxicated after 6 or 8 beers but still talk fine. (Testimony of TB) Upon review of the entire record and in light of the ongoing presence of a beer keg in the working area of the funeral home, the Board was persuaded that Respondent and his male employees were minimizing the alcohol consumption at the funeral home.

11. After separating from his wife, Respondent slept at the funeral home in a second floor bedroom with an attached bathroom that has a tub but no shower. The second floor office used by ME and TS had an attached bathroom with a shower, and Respondent frequently showered in this bathroom during work hours. Respondent walked through the office in front of TS and ME wearing only shorts or pajama bottoms and a towel around his shoulders or neck. The preponderance of the evidence established that while walking through her office, Respondent threw his towel or his wet washcloth at TS on multiple occasions. (Testimony of TS; ME; Respondent; TB; Exhibit 3, pp. 7, 13)

12. After she filed her complaint with the Board, TS contacted the county attorney and complained that Respondent was harassing her by making phone calls and driving past her house. Respondent denies calling TS, going to her home, or driving past her home after the complaint was filed. TS also provided information to the Division of Criminal Investigation (DCI) and to the Department of Insurance-Securities Bureau concerning some of Respondent's business practices. Both agencies conducted investigations, but no charges were filed against Respondent. (Testimony of TS; Respondent; Exhibit 2, p. 2; Exhibit 3, p. 2)

CONCLUSIONS OF LAW

At all times relevant to this decision, Iowa Code sections 147.55(3) and 272C.10(3) authorized licensing boards to discipline licensees for unethical conduct or practice harmful or detrimental to the public. Since 2005, the Board's rule at 645 IAC 103.3(4)(c) has provided:

103.3(4) Unethical, harmful or detrimental conduct. Licensees engaging in unethical conduct or practices harmful or detrimental to the public may be disciplined whether or not injury is established. Behaviors and conduct which are unethical, harmful or detrimental to the public may include but are not limited to the following actions:

...

c. Verbal or physical abuse, improper sexual contact, or making suggestive, lewd, lascivious, offensive or improper remarks or advances, if such behavior occurs within the practice of mortuary science or such behavior otherwise provides a reasonable basis for the board to conclude that such behavior would place the public at risk within the practice of mortuary science.

Upon review of the entire record, the Board was persuaded that Respondent engaged in unethical and harmful or detrimental conduct toward his employee and intern, TS, during the course of her employment at Kessler Funeral Homes. The conduct included verbal abuse and name calling and making suggestive, lewd, offensive and improper remarks. The Board was also persuaded that Respondent engaged in other inappropriate and demeaning conduct such as walking past TS partially undressed on his way to and from the shower and throwing wet towels and other items at her. Respondent should have showered prior to his employees reporting to work. If that was not possible for some reason, he should have been fully dressed in street clothes, not pajama bottoms or shorts, when going to and from the shower. It was entirely inappropriate for him to throw towels or washcloths at TS.

The Board considered the fact that TS did not file her complaint promptly and continued to work for Respondent, even after completing her internship. However, TS did report Respondent's conduct to a Board member on several occasions while she was still in her internship. The Board was persuaded that TS's decision to continue working for Respondent and her delay in filing a

formal complaint is not an indication that she fabricated her allegations. Rather, it appears that the delay was caused by a number of factors, including TS's financial circumstances and her dependency on the income that Respondent provided, her fear of retaliation by Respondent (whether or not the fear was justified), and her concern that filing a complaint could impact her ability to find further employment in Iowa as a funeral director. [REDACTED]

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TS's emotional responses and demeanor at hearing appeared very genuine, not contrived as Respondent suggests. In addition, ME was a very credible witness who had more opportunity to observe Respondent's behavior towards TS inside the funeral home than some of the other witnesses. ME provided important corroboration for TS's allegations that Respondent regularly engaged in name calling and lewd remarks and conduct. This behavior alone justifies the disciplinary sanctions imposed in this decision.

In addition, Respondent admitted sending TS on an errand to look at guns for sale. It was inappropriate for Respondent to send a funeral director intern on an errand to shop for guns under any circumstances. The circumstances were aggravated because TS had overheard Respondent engaged in an inappropriate discussion about killing his wife while TS was present. Even assuming that these discussions were never serious, there is no doubt that being sent on this errand would cause TS to feel intimidated.

It was inappropriate for Respondent to keep a beer keg in the working area of the funeral home. Given the location of the beer keg and the testimony of TS and ME, the Board finds that it is likely that at least some drinking occurred in areas of the funeral home outside of Respondent's living quarters. Keeping a beer keg in the work area of the funeral home set a terrible example for the employees and clearly contributed to an unprofessional and negative work atmosphere.

In reaching the conclusions in this decision, the Board recognizes that TS also participated in some inappropriate remarks and inappropriate joking with Respondent and her co-workers. It appears that she may have done so, at least in part, as a defensive mechanism to cope with the inappropriate comments that were directed at her. Nevertheless, it was Respondent's responsibility as both TS's preceptor and as a licensed funeral director to maintain an appropriate professional demeanor and to establish and maintain appropriate professional

boundaries with his employees and his intern. He clearly failed to do so and has violated Iowa Code sections 147.55(3) and 272C.10(3) and 645 IAC 103.3(4)(c).

DECISION AND ORDER

In determining an appropriate sanction, the Board considered the factors outlined in 645 IAC 103.6, including the seriousness and circumstances of the violations, whether the amount of the civil penalty will serve as a substantial deterrent, the risk of harm to the public, and the absence of any prior violations or complaints.

IT IS THEREFORE ORDERED that Respondent Mark Reed Kessler shall pay a civil penalty of \$1,000 within thirty (30) days of receipt of this Decision and Order.

IT IS FURTHER ORDERED that Respondent Mark Reed Kessler is hereby permanently prohibited from serving as a funeral director preceptor or from supervising an intern assigned to another preceptor. However, if TB's internship has not yet been completed at the time the Decision and Order is issued, Respondent will be permitted to finish serving as his preceptor due to the difficulty in finding a replacement preceptor at the very end of an internship.

IT IS FURTHER ORDERED that Respondent Mark Reed Kessler shall present a plan of remedial continuing education to the Board for its approval, no later than the next regularly scheduled Board meeting following his receipt of this Decision and Order. The continuing education plan must include a minimum of 12 hours of classroom instruction/discussion on the topics of Sexual Harassment in the Workplace, Professional Boundaries, and Diversity/Discrimination. Respondent shall provide verification of his completion of the continuing education coursework within six (6) months of obtaining Board approval for the course(s). If the continuing education has not been completed within Respondent's one year probationary period, the probationary period shall be extended until the continuing education has been completed and verified. These hours of continuing education may not be used for license renewal.

IT IS FURTHER ORDERED that the license to practice mortuary science issued to Mark Reed Kessler, license number 02202, shall be placed on probation for a minimum period of one (1) year, effective immediately upon issuance of this Order, and subject to the following terms and conditions:

- 1) Respondent shall comply with all relevant state and federal statutes and administrative rules in the course of his practice as a funeral director in the state of Iowa.
- 2) During the period of probation, Respondent must file monthly *sworn* reports with the Board on the tenth (10th) day of each month providing:
 - a. the dates on which Respondent has performed mortuary science services by contract, direct employment, or on any other basis;
 - b. the name of the decedent and name of the responsible party;
 - c. date of death and date contacted by the family;
 - d. date and time of funeral arrangement conferences;
 - e. date the Statement of Funeral Goods and Services was signed; and
 - f. date of final disposition and type of disposition.
- 3) Upon request, Respondent shall appear before the Board to answer any questions about his compliance with this Order. The Board will provide Respondent reasonable notice of the date, time, and place for any appearance.
- 4) Respondent shall notify any current or future employer and any current or future licensing authorities in any other states in which Respondent has or obtains a funeral director license of the existence of this disciplinary action and shall provide them with copies of the Board's Findings of Fact, Conclusions of Law, Decision and Order. Respondent shall provide the Board with written confirmation of any notification of a current or future employer or any other state licensing authority within thirty (30) days after receipt of this decision, and thereafter within ten (10) days of providing the notification.

5) If Respondent violates any provision of this Order, the Iowa Board of Mortuary Science may institute disciplinary proceedings pursuant to Iowa Code section 272C.3(2)"a"(2009). A probation violation would result in consideration by the Board of more serious sanctions, including suspension or revocation.

6) Successful completion of the probationary period shall constitute a final disposition of this matter.

IT IS FURTHER ORDERED that Respondent Mark Reed Kessler shall pay a \$75.00 hearing fee and \$330.00 in costs for the court reporter. The \$405.00 in hearing fees and costs shall be paid within thirty (30) days of receipt of this decision.

Pursuant to Iowa Code section 17A.19 and 645 Iowa Administrative Code 11.29 any appeal to the district court from disciplinary action of the board shall be taken within 30 days from the issuance of the decision by the board. It is not necessary to request a rehearing before the board to appeal to the district court. If an appeal is filed in district court, any costs incurred for the transcription of the record shall be paid by the Respondent. 645 IAC 11.23.

This findings of fact, conclusions of law, decision and order is approved by the board on October 7, 2009.

^{16*11} These redactions are necessary to avoid a clearly unwarranted invasion of personal privacy. The redacted information does not significantly contribute to the public's understanding of the Board's order.