IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CHARLIE J COCHLEY
Claimant

HY-VEE INC
Employer

APPEAL NO: 18A-UI-08895-JC-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/29/18
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the August 17, 2018, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on September 11, 2018. The claimant participated personally. The employer participated through Jennifer Rice, hearing representative with Corporate Cost Control. Chris Gordy, store director, testified for the employer. Employer Exhibit 1 was admitted into evidence.

The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a meat clerk and was separated from employment on August 1, 2018, when he was discharged for "conduct unbecoming of a Hy-Vee employee."

When the claimant was hired, he received training and access to the employer rules and policies which include no horseplay or lingering (See fact-finding document/administrative record and Employer Exhibit 1). The employer does not have written rules or procedures related to off-duty conduct, or employee conduct occurring on the premises if not working. The

employer also does not have any specific policy prohibiting dating employees or allowing employees to visit the store when off duty.

The undisputed evidence is the claimant was having an out-of-work, romantic relationship with his assistant manager, Amy, who was married but not to the claimant. The relationship was common knowledge amongst employees and management (Gordy/Claimant testimony). On July 26, 2018, an employee reported to an assistant manager feeling uncomfortable after observing the claimant and Amy together (Gordy testimony).

The claimant while off-duty, and out of uniform, visited Amy during her shift that evening and was observed going outside with her for a brief period, and then standing at the front end of the registers with her. According to the employee's report, video surveillance and the claimant, he touched Amy's neck to flirt with her and kissed her goodbye while at the employer store that evening. The employer opined that the claimant's lingering contributed to Amy not doing her job while on duty. After reviewing the surveillance video and complaint, the employer met with the claimant on August 1, 2018. Both Amy and the claimant were subsequently discharged. Prior to separation, the claimant had not been warned formally or informally for off-duty conduct, or anything related to his relationship with Amy.

The administrative record reflects that claimant has received unemployment benefits in the amount of $1,314.00, since filing a claim with an effective date of July 29, 2018. The administrative record also establishes that the employer did participate in the August 16, 2018 fact-finding interview or make a witness with direct knowledge available for rebuttal. Chris Gordy participated.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). 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).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id*. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

At the crux of this matter is whether the claimant knew or should have known that his conduct on July 26, 2018, when on the employer premises, off-duty, and not in uniform or otherwise appearing affiliated with the employer, could lead to his discharge. The undisputed evidence is the employer, including management, knew the claimant was involved in a romantic relationship with his married manager. Prior to July 26, 2018, the employer did not have a policy applying to their conduct, as it applies to fraternization or personal relationships. The employer also did not have a policy which put employees on notice that their conduct off-duty, whether on employer premises or not, could lead to discharge. Further, in light of the employer's knowledge of the claimant and his married manager having a relationship, there had been no discussion or warning to the claimant prior to separation.

Under the definition of misconduct for purposes of unemployment benefit disqualification, the conduct in question must be "work-connected." *Diggs v. Emp't Appeal Bd.,* 478 N.W.2d 432 (Iowa Ct. App. 1991). The court has concluded that some off-duty conduct can have the requisite element of work connection. *Kleidosty v. Emp't Appeal Bd*., 482 N.W.2d 416, 418 (Iowa 1992). Under similar definitions of misconduct, for an employer to show that the employee's off-duty activities rise to the level of misconduct in connection with the employment, the employer must show by a preponderance of the evidence that the employee's conduct (1) had some nexus with the work; (2) resulted in some harm to the employer's interest, and (3) was conduct which was (a) violative of some code of behavior impliedly contracted between employer and employee, and (b) done with intent or knowledge that the employer's interest would suffer. See also, *Dray v. Director*, 930 S.W.2d 390 (Ark. Ct. App. 1996); *In re Kotrba*, 418 N.W.2d 313 (SD 1988), quoting *Nelson v. Dept of Emp't Security*, 655 P.2d 242 (WA 1982); 76 *Am. Jur. 2d, Unemployment Compensation* §§ 77–78.

In this case, the claimant was off-duty and on the employer premises, and therefore a reasonable nexus to the employer work place existed. It is possible that his presence may have distracted Amy, who was supposed to be working and act in her managerial capacity. However, the evidence presented does not support that the claimant's brief visit to the store violated some code of behavior or rule contracted by the employer and employee or that it was done with the intent or knowledge that the employer's interest would suffer. If this case was about Amy, who the claimant kissed, while she was on duty, on July 26, 2018, the outcome may be different, inasmuch as she was on-duty, in a management role during the conduct for which they were fired occurred. However, to a customer or stranger visiting the store on July 26, 2018, it would not have been apparent that the claimant was an employee of Hy-Vee, since he was not in uniform, and an observer would have simply observed a female employee was being kissed and flirted with at the register with a male.

The administrative law judge does not condone extramarital conduct by any party, but is not persuaded that claimant knew or could have reasonably known on July 26, 2018 that he could be discharged for his conduct and visit, in light of no applicable policy to off-duty conduct or prior warnings. At most, the claimant's conduct on July 26, 2018 was an isolated instance of poor judgment. Inasmuch as the employer had not previously warned the claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. Training or general notice to staff about a policy is not considered a disciplinary warning. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. The employer

has not met its burden of proof to establish a current or final act of misconduct, and, without such, the history of other incidents need not be examined.

The question before the administrative law judge in this case is not whether the employer has the right to discharge this employee, but whether the claimant's discharge is disqualifying under the provisions of the Iowa Employment Security Law. While the decision to terminate the claimant may have been a sound decision from a management viewpoint, for the above stated reasons, the administrative law judge concludes that the employer has not sustained its burden of proof in establishing that the claimant's discharge was due to job related misconduct. Accordingly, benefits are allowed, provided the claimant is otherwise eligible.

Because the claimant is eligible for benefits, the issues of overpayment and relief of charges are moot.

DECISION:

The August 17, 2018, (reference 01) decision is affirmed. The claimant was discharged for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. The claimant has not been overpaid benefits. The employer's account is not relieved of charges.

_____
Jennifer L. Beckman
Administrative Law Judge

_____
Decision Dated and Mailed

jlb/scn