

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DEREK J COCHRAN
Claimant

APPEAL NO. 10A-UI-02711-VS

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 01/24/10
Claimant: Appellant (2)

Section 96.5-2-a – Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated February 11, 2010, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on April 20, 2010, in Cedar Rapids, Iowa. Claimant participated. Caitlin Harrington was a witness for the claimant. Employer participated by Christopher Woodhouse, assistant manager; Jackie Jedlicka, customer service manager; Rebecca Hayslett, checker/stocker; and Tasia Miggins, assistant manager. The record consists of the testimony of the following individuals: Derek Cochran; Caitlin Harrington; Christopher Woodhouse; Jackie Jedlicka; Rebecca Hayslett; and Tasia Miggins. The record also consists of Claimant's Exhibits A-KK.

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 owns and operates retail grocery stores. The store at which the claimant worked is located in Iowa City, Iowa. The claimant was hired in December 2007 as a part time checker/stocker. He was terminated on January 21, 2010.

The reason that the claimant was terminated was what the employer deemed as insubordination. The employer believed that the claimant had not followed orders and was disrespectful to Jackie Jedlicka, the customer service manager. After he was terminated, the employer placed a written warning in his file and backdated that warning to November 12, 2009. The claimant was cited for being argumentative about taking cans to the recycling center. On some unknown date, the claimant was heard to refer to Ms. Jedlicka as a "cunt."

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 or in repeated acts of carelessness or negligence. In order to justify disqualification, the evidence must establish that the final incident leading to the decision to discharge was a current act of misconduct. See 871 IAC 24.32(8). See also Greene v. EAB, 426 N.W.2d 659. The employer has the burden of proof to show misconduct.

The evidence in this case failed to show a current act of misconduct. Each of the employer's witnesses was questioned carefully to determine the date or dates of the insubordination occurred. The only date that could be pinpointed was November 12, 2009, when the claimant became argumentative over taking cans to the recycling center. The claimant was not terminated until January 21, 2010 and therefore anything that happened on November 12, 2009, is not a current act of misconduct. Although there was credible evidence that the claimant referred to Ms. Jedlicka as a cunt, the witnesses could not remember when he said this.

The employer had the burden of proof to show a current act of misconduct. This burden was not met. The claimant did have a personality conflict with Ms. Jedlicka and their working relationship was fraught with problems. Insubordination and the use of profanity could meet the

statutory definition of misconduct. Where the employer's evidence fails is the inability to show a current act of misconduct. Past actions alone are not sufficient to sustain the burden of proof. Accordingly, benefits are allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated February 11, 2010, reference 01, is reversed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs