eXpress. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a part-time checker, stocker, and cashier, from May 8, 2004 until she was discharged on September 9, 2005. The claimant averaged between 15 and 25 hours per week. The claimant was discharged for leaving an allegedly inappropriate and improper voicemail message on the voicemail of a co-worker, Mary Pence. The employer characterized this as conduct unbecoming of a Hy-Vee employee. The employer has a policy in its employee handbook prohibiting disorderly conduct and verbal abuse. The claimant received a copy and signed an acknowledgement therefore.

On Monday, September 5, 2005, at 4:26 p.m., the claimant called a co-worker, Mary Pence and left a voicemail message for Ms. Pence. The voicemail message indicated that Ms. Pence did not know her but that the claimant had a disability and she would get medical records to verify the disability. The claimant used no profanity during the voicemail message and made no specific threats. The employer alleged that the claimant said something to the effect that she was going to get her (Ms. Pence) or that the claimant was going to get even with Ms. Pence. However, the claimant made no such statements. Ms. Pence listened to the voicemail message only once and then reported it to the Manager of General Merchandise, Mike Miller, one of the employer's witnesses. He only listened to the message once. Then the tape of the message was "accidentally" erased. The claimant had never received any warnings or disciplines for related matters and there was no other reason for the claimant's discharge. On September 6, 2005, the Store Director, Scott James, one of the employer's witnesses, confronted the claimant and the claimant said that she had done wrong and apologized.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from employment was a disqualifying event. It was not.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The parties agree, and the administrative law judge concludes, that the claimant was discharged on September 9, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. Although it is a close question, the administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The only reason given by the employer for the claimant's discharge was a voicemail message that the claimant left on the voicemail of a co-worker, Mary Pence.
All the parties agree that the claimant left a voicemail message. The parties also seem to agree that the claimant said something to the effect that she had a disability and that she would get medical records to establish this. The employer's witnesses testified that the claimant made some kind of a threat. Only two witnesses for the employer heard the tape and each only listened to the tape once. The tape was then "accidentally" erased. One witness, Mary Pence, Cashier, testified that the claimant stated that the claimant did not know what Ms. Pence was doing. Ms. Pence then testified that the claimant said that she was "going to get her for this." The other witness, Mike Miller, Manager of General Merchandise, testified that the claimant stated she knew what Ms. Pence had done and she was going to "get even" with Ms. Pence. Mr. Miller testified that the claimant did say something about her disability. The versions of the two witnesses are sufficiently different to call into question their specific recollection of the voicemail message. It is true that their recollections are similar in some respects but they are also different. The claimant was most adamant that she made no threats to Ms. Pence and denied stating that she was going to get Ms. Pence or that she was going to get even with Ms. Pence. All the parties agree that there was no profanity and no specific threats made.

Although it is a close question, the administrative law judge is constrained to conclude that the small differences in the recollection of the employer's two witnesses do not offer sufficient credibility to offset the claimant's most adamant direct testimony that she made no such statements. This is a close question but the administrative law judge concludes that the claimant made no threats to Ms. Pence. The claimant did tell the Store Director, Scott James, one of the employer's witnesses, when he confronted her on September 6, 2005, that she was wrong and that she apologized. However, this is not an admission that the claimant made a

threat but only that the claimant felt that the phone call may have been inappropriate. The phone call probably was inappropriate since the claimant seemed upset and angry. However, in the clear absence of any profanity or specific threats and insufficient evidence of a general threat, the administrative law judge is constrained to conclude that the claimant's voicemail message was not a deliberate act constituting a material breach of her duties nor did it evince a willful or wanton disregard of the employer's interest. The administrative law judge is also constrained to conclude that although the claimant's voicemail message may have been negligent or careless, it was not negligence or carelessness in such a degree of recurrence as to establish disqualifying misconduct. There was no evidence that the claimant had ever received any relevant warnings or disciplines. The voicemail message, therefore, was an isolated instance of negligence and not disqualifying misconduct. There does appear to be some other allegations or issues between the parties making them contentious but those issues, whatever they may be, are not relevant here. The only reason given by the employer's witnesses for the claimant's discharge was the voicemail message that the claimant left for Ms. Pence.

In summary, and for all the reasons set out above, although it is a close question, the administrative law judge is constrained to conclude that there is not a preponderance of the evidence of any acts on the part of the claimant rising to the level of disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct and, as a consequence, she is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily enough to warrant a denial of unemployment insurance benefits and misconduct to support a disqualification for unemployment insurance benefits must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant a disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant provided she is otherwise eligible.

DECISION:

The representative's decision of October 3, 2005, reference 01, is reversed. The claimant, Diana L. Thorson, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she was discharged but not for disqualifying misconduct. .

kkf/kjw