IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JAMES T TORGERSON
Claimant

HY-VEE INC
Employer

APPEAL NO: 11A-UI-09541-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/05/11
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Hy-Vee, Inc. (employer) appealed a representative's July 13, 2011 decision (reference 01) that concluded James T. Torgerson (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 11, 2011. The claimant participated in the hearing. Alice Rose Thatch of Corporate Cost Control appeared on the employer's behalf and presented testimony from one witness, Matthew Porter. During the hearing, Employer's Exhibits One, Two, and Three were entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

After a prior period of employment with the employer, the claimant most recently started working for the employer on August 22, 2006. As of March 14, 2011 he worked full time as an assistant manager of store operations at the employer's LeMars, Iowa store. His last day of work was June 3, 2011. The employer discharged him on that date. The reason asserted for the discharge was violation of the employer's sexual harassment policy.

On May 26 a department manager came to the claimant and reported that an outside product vendor had been eyeing two of the employees of that department and making them feel uncomfortable. The claimant told the manager to let him know the next time the vendor was in the store. On May 29 the manager reapproached the claimant and reported that the vendor was back in the store. The claimant then made a flippant remark, saying that the vendor was "probably just thinking about f - - - ing (employee name)." The manager did not respond, and the claimant did not think anything further of the remark he had made, thinking it was just a smart aleck remark between he and the other manager whom he considered a friend. However, the manager was the parent of the named employee, and took offense; the claimant's making of the remark was then reported to higher management. The employer concluded that the

claimant's making of the remark was a violation of the employer's sexual harassment policy, and therefore discharged the claimant. The claimant had no prior record of any other disciplinary issues.

The employer's harassment policy in general indicates that "employees should be treated and should treat each other with dignity and respect." As to sexual discrimination and harassment, the policy indicates that the employer intended to "protect individuals from discriminatory treatment and harassment because of their sex," and that "sexual harassment is a form of sex discrimination and is prohibited." "sexual harassment" is defined as "any unwarranted injection of sexual matters in the work place and includes sexual advances, requests for sexual favors, and other verbal or physical conduct of sexual nature when: 1) submission to the conduct is made either an explicit or implicit condition of employment (for example, where the employee is hired or fired); 2) submission to or rejection of the conduct is used as the basis for an employment decision affecting the harassed employee (for example, where the employee is promoted or demoted); or, 3) the harassment substantially interferes with an employee's work performance or creates an intimidating, hostile, unpleasant, or offensive work environment."

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, 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 is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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. 871 IAC 24.32(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is violation of the sexual harassment policy. Under the employer's policy the closest provision which could apply to the specific situation is that it might create an "intimidating, hostile, unpleasant, or offensive work environment" for the department manager. The administrative law judge is not convinced that the making of a single vulgar remark is sufficient to constitute an "intimidating, hostile,

unpleasant, or offensive work environment." While the claimant's making of the remark was certainly thoughtless and disappointing conduct for a manager, and he certainly deserved to be reprimanded for even the use of the vulgar language, under the circumstances of this case, the claimant's making of the remark was the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence in an isolated instance, and was a good faith error in judgment or discretion. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's July 13, 2011 decision (reference 01) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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