

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

BRIAN M MCCLIMANS
Claimant

HY-VEE INC
Employer

APPEAL 19A-UI-08990-JC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 10/20/19
Claimant: Respondent (2)

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/appellant, Hy-Vee Inc., filed an appeal from the November 5, 2019 (reference 01) Iowa Workforce Development (“IWD”) unemployment insurance decision that allowed unemployment insurance benefits. The parties were properly notified about the hearing. A telephone hearing was held on December 10, 2019. The claimant, Brian M. McClimans, did not respond to the notice of hearing to furnish a phone number with the Appeals Bureau and did not participate in the hearing. The employer, Hy-Vee Inc., participated through Barbara Buss, a hearing representative with Corporate Cost Control Inc. Betsy Hass, operations manager, testified.

The administrative law judge took official notice of the administrative records including the fact-finding documents. Employer Exhibits 1-8 were admitted into evidence. 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 part-time as a courtesy clerk and was separated from employment on September 16, 2019, when he was discharged (Employer Exhibit 1). The employer stated the claimant was discharged for “conduct unbecoming of a Hy-Vee employee” (Employer Exhibits 1-2).

The claimant was trained on the employer's rules and procedures throughout employment including its code of conduct and rules against harassment (Employer Exhibits 5-8). The claimant had once been counseled in 2015 for his interactions with co-workers which made the co-workers uncomfortable (Employer Exhibit 4).

The final incident occurred on September 14, 2019 when the claimant spoke to two female co-workers, who were minors. The claimant made comments about their appearance and inquired about whether the employees had considered dating an older man (the claimant was approximately twenty four years older). The employees asked the claimant to stop and he did not. The employees then reported the conversation to management. When management tried to talk to the claimant, he first ran away from them. He was sent home and brought back to work on September 16, 2019. He prepared a written statement (Employer Exhibit 3) and admitted to making the statements alleged. He told Ms. Hass that it was her fault for hiring minors as employees. The employer then fired him.

The claimant did not attend the hearing to refute the employer's evidence or offer an explanation for his separation.

The administrative record reflects that claimant has a weekly benefit amount of \$134.00 but has not received unemployment benefits since filing a claim with an effective date of October 20, 2019. The administrative record also establishes that the employer did participate in the fact-finding interview or make a witness with direct knowledge available for rebuttal. Betsy Hass attended.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for disqualifying job-related misconduct.

Iowa unemployment insurance law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id.*

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).

The employer has the burden of proof in establishing disqualifying job related misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 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. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). 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 Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The focus of the administrative code definition of misconduct is on deliberate, intentional or culpable acts by the employee. *Id.*

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.*

Administrative agencies are not bound by the technical rules of evidence. *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 630 (Iowa 2000). A decision may be based upon evidence that would ordinarily be deemed inadmissible under the rules of evidence, as long as the evidence is not immaterial or irrelevant. *Clark v. Iowa Dep't of Revenue*, 644 N.W.2d 310, 320 (Iowa 2002). Hearsay evidence is admissible at administrative hearings and may constitute substantial evidence. *Gaskey v. Iowa Dep't of Transp.*, 537 N.W.2d 695, 698 (Iowa 1995). Assessing the credibility of the employer witness 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 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.

The question of whether the refusal to perform a specific task constitutes misconduct must be determined by evaluating both the reasonableness of the employer's request in light of all circumstances and the employee's reason for noncompliance. *Endicott v. Iowa Dep't of Job Serv.*, 367 N.W.2d 300 (Iowa Ct. App. 1985).

In this case, the claimant was asked by coworkers on September 14, 2019 to discontinue making comments to two coworkers that made them uncomfortable. The claimant did not stop the comments. When questioned by the employer on September 16, 2019, he admitted to the comments. The claimant did not attend the hearing to refute the credible evidence presented by the employer. He has failed to establish a reason that would mitigate or excuse his conduct, based upon the reasonable request. The administrative law judge is persuaded the claimant knew or should have known his conduct was contrary to the best interests of the employer.

Therefore, based on the evidence presented, the administrative law judge concludes the claimant was discharged for misconduct. Benefits are denied.

Because the claimant's separation was disqualifying, benefits were originally allowed. However, he did not receive any benefits and therefore there is no overpayment in accordance with Iowa Code § 96.3(7). The administrative law judge further concludes the employer did satisfactorily participate in the fact-finding interview pursuant to Iowa Code § 96.3(7), Iowa Admin. Code r. 871-24.10.

DECISION:

The November 5, 2019 (reference 01) initial decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Jennifer L. Beckman
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Decision Dated and Mailed

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