

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ELARIO B MCGILL
Claimant

HY-VEE INC
Employer

APPEAL 22A-UI-01308-AR-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 11/14/21
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, Hy-Vee, Inc., filed an appeal from the December 6, 2021, (reference 01) unemployment insurance decision that allowed benefits based upon the determination that claimant was discharged from employment, but not for disqualifying misconduct. The parties were properly notified of the hearing. A telephone hearing was held on February 16, 2022. The claimant, Elario B. McGill, participated personally. The employer participated through Jennifer Rice and Brandy Kading, who did not testify, and Chance Duin, who did testify. Employer's Exhibits 1 through 10 were admitted. The administrative law judge took official notice of the administrative record.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can 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: Claimant was employed full time as an inventory clerk from September 25, 2019, until this employment ended on November 10, 2021, when he was discharged.

On November 8, 2021, a coworker of claimant's reported to HR that claimant had pressed up against her in the storage room. She stated she felt uncomfortable. HR initiated an investigation. Claimant was asked about the incident. He denied that anything occurred. He explained that the coworker asked him to lift her up to get something off a high shelf. She did not indicate to claimant that she was uncomfortable with the interaction. The employer sent claimant home pending investigation.

During the investigation, another coworker reported that claimant made offensive statements about her sexual orientation and made sexual advances. Specifically, she alleged that claimant offered her a “threesome” when he learned the coworker was a lesbian. Claimant adamantly denies this.

On July 17, 2021, the employer issued claimant a written warning after he made another coworker uncomfortable regarding his inquiries about her sexual orientation. Claimant asserts that this was the same incident as the one reported in November 2021 during the investigation. He adamantly denies that two separate incidents of this nature occurred. During this interaction, the coworker volunteered information about her sexual orientation. Claimant asked if she had kids, to which she answered yes. Claimant then inquired how two women can have children. He believes it was this question that offended the coworker.

During the investigation, the employer attempted to reach out to claimant, but could not get in touch with him. It tried to call claimant initially, but never received a call back. Then, on November 12, 2021, Duin emailed claimant to inform him of the discharge due to conduct unbecoming of an employee. Claimant did not receive this email. He determined he had been separated from employment when he visited the store to gather his things and they had been placed with security at the front of the store.

The employer maintains an anti-harassment policy. Claimant signed a form acknowledging that he had received it at the time of his hire. He did not know that his conduct violated this policy, or that his conduct might jeopardize his employment.

REASONING AND CONCLUSIONS OF LAW:

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

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.

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 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 must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

The conduct for which claimant was discharged was merely an isolated incident of poor judgment. 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. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning.

While the evidence suggests that claimant may have made coworkers uncomfortable, the employer has not established that claimant did so knowingly with disregard for the employer's established policies. Though claimant had received a warning for conduct in the past, the employer has not established that it was for conduct sufficiently similar to that for which claimant was discharged such that claimant could reasonably have known that his conduct on November 8, 2021, would jeopardize his employment. He credibly testified that he did not intend to make or even know that he made his coworker uncomfortable. Furthermore, he adamantly denied the most concerning allegation—the overt sexual advance. The employer has not established that claimant repeatedly engaged in similar conduct despite warnings, or that he engaged in conduct so egregious as to constitute disqualifying misconduct even without prior warning. The administrative law judge reiterates that the question here is not whether the employer made the *correct* decision in separating claimant, but rather whether it has established that claimant engaged in disqualifying misconduct; it has not so established. No disqualification is imposed.

Because the separation from employment is not disqualifying, the issues of overpayment, repayment, and participation are moot.

DECISION:

The December 6, 2021, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. The issues of overpayment, repayment, and participation are moot.



Alexis D. Rowe
Administrative Law Judge

March 7, 2022
Decision Dated and Mailed

ar/scn