

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**WAYDE D REUTER**  
Claimant

**APPEAL NO. 14A-UI-09589-NT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**HY-VEE INC**  
Employer

**OC: 08/17/14**  
**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

Claimant filed a timely appeal from a representative's decision dated September 9, 2014, reference 01, which denied unemployment insurance benefits. After due notice was provided, a telephone hearing began on October 6, 2014 and reconvened on October 28, 2014. Mr. Reuter participated personally. Participating on behalf of the claimant was Ms. Emilie Roth, Attorney at Law. The employer participated by Mr. Bruce Burgess, Hearing Representative and witnesses, Ms. Lanie Cooney, Human Resource Supervisor; Ms. Abby Olson, Store Director; and Mr. Joshua Collister, Perishable Manager. Employer's Exhibits A, B and C were received into evidence. Mr. Shoemaker, a witness subpoenaed by the claimant and currently employed at a Hy-Vee facility in another state, did not respond to the subpoena and did not participate.

**ISSUE:**

The issue in this matter is whether the claimant was discharged for a current act of misconduct sufficient to warrant the denial of unemployment insurance benefits.

**FINDINGS OF FACT:**

Having considered all the evidence in the record, the administrative law judge finds: Wayde Reuter was employed by Hy-Vee, Inc. from April 1, 1988 until August 21, 2014, when he was discharged from employment. Mr. Reuter held the position of full-time meat specialist and was paid by the hour. His immediate supervisor was the meat department manager, Mr. Allen Helly.

Mr. Reuter was discharged on August 21, 2014, following an investigation that had concluded on August 6, 2014. The investigation was based upon an allegation that had been made in the past by Laurel Morris, a meat department employee of Asian descent, who had complained that the claimant as well as the meat department manager, had engaged in making racial and gender-based slurs and statements about company customers. Ms. Morris described the words used and described a number of situations where she had heard Mr. Reuter make the comments but did not specify when the events may have occurred other than indicating that they had occurred "often."

Based upon the serious allegation that Mr. Reuter had been referring to customers by using racially derogatory slurs and/or gender-related slurs, the company began an internal investigation and interviewed approximately eight employees. In addition to Ms. Morris who made the initial complaint, four witnesses confirmed when questioned that they had heard or observed situations such as those described by Ms. Morris in the past but did not supply information about when they may have occurred. Other witnesses apparently had not witnessed any comment on the part of Mr. Reuter of the nature described by Ms. Morris and at least one witness, Mr. Shoemaker, had stated that he had not witnessed any conduct of that nature by the claimant while employed at Hy-Vee.

The investigation culminated on August 6, 2014 when Mr. Reuter was questioned at length about the allegations that he had made racially and gender-based slurs. The claimant denied making statements of that nature and when asked "why" a person might be motivated to make a racially insensitive statement, Mr. Reuter referenced the fact that a family member had been murdered by a black person. At the conclusion of the August 6 investigation and the meeting held with Mr. Reuter, the claimant asked if he was going to be discharged from employment. Mr. Collister responded, "No, I'm not going to be walking you out."

Mr. Reuter continued to be employed by Hy-Vee, Inc. from August 6, 2014 when the investigation was concluded until August 21, 2014 when he was discharged from employment. At the time of discharge the claimant asked why he had not been discharged "sooner," referring to the over two-week time period that had elapsed between the time that the investigation was completed and the date he was discharged from employment. The delay in discharging Mr. Reuter took place because other managers were on vacation and the claimant had been authorized to take a one-week vacation period in the interim. Prior to being discharged the claimant had not been warned or counseled by his employer and the claimant's immediate supervisor, the meat department manager who worked with Mr. Reuter on a daily basis, had not placed Mr. Reuter on notice that any of his conduct had been unacceptable.

#### **REASONING AND CONCLUSIONS OF LAW:**

The question before the administrative law judge is whether the evidence in the record establishes a current act of misconduct sufficient to warrant the denial of unemployment insurance benefits. It does 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.

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). Iowa Admin. Code r. 871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

In discharge cases, the employer has the burden of proof in establishing disqualifying job misconduct on the part of a claimant. See Iowa Code section 96.6-2. Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant a denial of unemployment insurance benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

Allegations of misconduct without additional evidence shall not be sufficient to result in a disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

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 a current act of job-related misconduct as the reason for the separation, the employer incurs potential liability for unemployment insurance benefits related to that separation.

In the case at hand an employee made an allegation that the claimant had "often" engaged in making racial and gender-biased slurs in reference to company customers. The employee who made the complaint described some situations and described the inappropriate slurs that she attributed to the claimant. The complaining employee, however, did not indicate when the incidents may have occurred. Because the allegations, if true, would be a serious breach of the company's harassment and inappropriate conduct policies, the company began an investigation. Some witnesses that were questioned stated that they were not aware of any conduct on the part of the claimant of the nature described by Ms. Morris and others described some situations that they had observed that seemed to confirm Ms. Morris' allegations but did

not specify whether the claimant's conduct had been recent or taken place sometime in the past. Mr. Reuter had not been warned or counseled by Hy-Vee, Inc. for any reason during the long period that he had been employed by the company and the claimant's immediate supervisor in the meat department had not warned or counseled Mr. Reuter, as well. When questioned Mr. Reuter denied the allegations and only responded to a hypothetical question posed to him as to why an inappropriate statement might be made.

At the conclusion of the meeting held on August 6, 2014, which culminated the investigation, Mr. Reuter was assured that he would not be "walked out" (terminated, based upon the allegations). No additional acts of potential misconduct on the part of the claimant were alleged by the employer during the intervening 15 days until Mr. Reuter was informed that he was being terminated from his employment.

The administrative law judge does not condone nor sanction the use of any inappropriate racial or gender slurs. In this case, however, the claimant was discharged based upon allegations of conduct that occurred without any references to when the offenses took place, who was present or the circumstances. The claimant had been assured that he would not be discharged, but nonetheless was discharged over two weeks later and the employer chose not to furnish available evidence in the form of first-hand witnesses to corroborate the allegation that Mr. Reuter had engaged in misconduct sufficient to warrant the denial of unemployment insurance benefits.

The question before the administrative law judge is not whether the employer has a right to discharge Mr. Reuter for these reasons but whether the discharge is disqualifying under the provisions of the Employment Security Law. While the decision to terminate Mr. Reuter may have been a sound decision from a management viewpoint, for the above-stated reasons the administrative law judge concludes that the employer has not sustained its burden of proof in establishing a current act of misconduct sufficient to warrant the denial of unemployment insurance benefits. Benefits are allowed providing the claimant is otherwise eligible.

**DECISION:**

The representative's decision dated September 9, 2014, reference 01, is reversed. The claimant was discharged under non-disqualifying conditions. Unemployment insurance benefits are allowed, providing the claimant meets all other eligibility requirements of Iowa law.

---

Terence P. Nice  
Administrative Law Judge

---

Decision Dated and Mailed

css/css