

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ROGER L LUING
Claimant

HY-VEE INC
Employer

APPEAL 20A-UI-04298-HP-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 04/12/20
Claimant: Appellant (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant Roger Luing filed an appeal from the May 15, 2020 (reference 01) unemployment insurance decision that denied benefits based upon his discharge from employment. Barbara Buss represented Hy-Vee Inc. (“Hy-Vee”), the employer. Liz McMahan, John Griesenbrock, Matt Pacha, and Kevin Kisling appeared and testified on behalf of Hy-Vee. Claimant Roger Luing appeared and testified. Exhibits 1 through 6 were admitted into the record. I took administrative notice of Luing’s unemployment insurance benefits records maintained by Iowa Workforce Development.

ISSUE:

Was the Claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Luing commenced his employment with Hy-Vee on February 10, 2000. Luing had worked as the dairy department manager. In late February or early March 2020, Hy-Vee restructured its business. Luing’s job title was changed to “day stock crew member.” Luing continued to stock the dairy and frozen departments and other departments. Hy-Vee did not modify Luing’s pay or hours of work.

Griesenbrock has been a District Store Director since February 2020, overseeing four stores, including the store where Luing worked, Ames 2. Griesenbrock has been employed by Hy-Vee for twenty-five years. Griesenbrock, McMahan, the human resources manager for the Ames 2 Hy-Vee for the past few months, Pacha, and Kisling testified Pacha and Kisling were the direct supervisors of Luing in 2020. Three months ago, Hy-Vee changed Pacha’s job title to manager of perishables from manager of store operations at the Ames 2 store. Pacha’s transfer to manager of perishables was a lateral transfer. Kisling is the manager of store operations at the Ames 2 store. Luing disagreed Pacha was his supervisor during his employment and testified he believed Kisling was his supervisor. Griesenbrock, McMahan, and Pacha testified Pacha was Luing’s supervisor when he received discipline in August 2017 and again in April 2020.

On April 10, 2020, Pacha told Luing to restock a dairy cooler. Pacha came back ten minutes later and saw Luing had not restocked the dairy cooler. Luing testified Pacha told him to stop making excuses and to respond, "yes sir, or no sir." Luing became angry and testified he said, "Fuck no, I'm not calling you yes sir, no sir." Kisling was in the cooler and testified he overheard the conversation. The incident occurred on the retail floor.

Luing, Pacha, and Kisling immediately went to McMahon's office to discuss the incident. Exhibit 3 was prepared, documenting the incident. McMahon testified Luing admitted directing the "F-word" toward Pacha. The corrective plan of action states "Roger will not use foul language directed at any employee, customer or member of management while on Hy-Vee property." (Ex. 3) Exhibit 3 also provides Luing's behavior will need to improve to avoid termination. Luing was instructed to leave the store for the day. Luing and Pacha separately reported the incident to Griesenbrock that day.

Griesenbrock looked at Exhibits 4 and 5, Hy-Vee Employee Consultation Forms with occurrence dates on August 3, 2017 and August 22, 2017. Exhibit 5 notes on August 3, 2017, Luing believed his coworkers were clogging a hallway. An employee responded he was trying to get out of his way, but it was the busiest hallway. (Ex. 5, p. 2) The employee reported after additional discussion, Luing stated, "Oh, fuck off!" (Ex. 5, p. 2) The Hy-Vee Employee Consultation Form provides "next confirmed event of profanity and/or aggressive behavior will result in termination." (Ex. 5, p. 1) During the hearing, Luing stated he could not recall the incident and denied signing the form.

Exhibit 4 notes on August 22, 2017, Luing became defensive when confronted about working the front end of the store. According to the document, Luing started shouting and using profanities, including the "F word." (Ex. 4) The corrective plan of action section of the form states "[f]oul language and yelling will not be tolerated in this store." (Ex. 4) The form also states "customers should not have to wait because we are 'too busy.'" (Ex. 4) Luing stated he could not recall the incident.

Luing admitted the old store director, Kevin Mills, had spoken to him about using vulgar words and profanity in the past. Luing reported Mills told him using vulgar words or profanity could result in his discharge.

On April 11, 2020, Luing waited in his vehicle until Griesenbrock was available. Luing met with Griesenbrock and Kisling in Griesenbrock's office. Luing admitted he said, "Fuck no, I'm not calling you yes sir, no sir." Griesenbrock determined Luing should be terminated for conduct unbecoming a Hy-Vee employee when Luing directed a vulgar word to Pacha, an employee, and also a supervisor. Griesenbrock stated Luing's past warnings in August 2017 supported his decision to terminate Luing. Griesenbrock terminated Luing during the meeting. During the meeting Griesenbrock filled out Exhibit 2, a Hy-Vee Employee Termination Report. In the Termination Report, Griesenbrock wrote Luing lost his cool and told a supervisor "Fuck you," noted Luing had been warned on two other occasions that if he used obscene or offensive language toward anyone it would be grounds for termination, and noted Luing was being terminated for "conduct unbecoming a Hy-Vee employee." (Ex. 2)

Luing received an employee handbook from Hy-Vee. McMahon and Pacha testified the handbook has a policy against engaging verbal or physical abuse or profanity. Luing could not recall when he received the handbook. The employee acknowledgement for the handbook is dated February 16, 2012. (Ex. 6, p. 2)

Luing reported Pacha and McMahon had been disrespectful of him and that he reported this to Kisling. Kisling testified he recalled one conversation that was not a formal complaint. Kisling reported Luing told him with the changes going on at the store he was unsure if it would work and Kisling responded, "we have to make it work." Kisling denied he told Luing, Pacha and McMahon had been disrespectful of Kisling. Luing did not report Pacha or McMahon had directed any vulgar or profane words toward him.

REASONING AND CONCLUSIONS OF LAW:

Under Iowa Code section 96.5(2)a,

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits: . . .

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 disqualification shall continue 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 Iowa Administrative Code 24.31(1)a, defines the term "misconduct" 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 Iowa Legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 558 (Iowa 1979).

871 Iowa Administrative Code 24.32(4) also provides,

Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

And 871 Iowa Administrative Code 24.32(8) provides:

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.

The employer bears the burden of proving the employee engaged in disqualifying misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6, 11 (Iowa 1982) The issue is not whether the employer made a correct decision in separating the claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262, 264 (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, 808 (Iowa Ct. App. 1984) The definition of misconduct in the administrative rule focuses on deliberate, intentional, or culpable acts by the employee. *Id.* When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* at 808-09. Negligence does not constitute misconduct unless it is recurrent in nature; a single act is not disqualifying unless it is indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731, 735 (Iowa Ct. App. 1986) Additionally, poor work performance is not misconduct in the absence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211, 213 (Iowa Ct. App. 1988). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 666-69 (Iowa 2000) What constitutes misconduct justifying termination of an employee and what misconduct warrants a denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679, 680 (Iowa Ct. App. 1988) Instances of poor judgment are not misconduct. *Richers v. Iowa Dep't of Job Serv.*, 479 N.W.2d 308, 312 (Iowa 1991); *Kelly v. Iowa Dep't of Job Serv.*, 386 N.W.2d 552, 555 (Iowa Ct. App. 1986)

Luing admitted he told Pacha "Fuck no, I'm not calling you yes sir, no sir," in the dairy cooler in the store in the area where customers shop. Luing contends his actions were not sufficiently egregious to be considered misconduct. "[A]n employer has the right to expect decency and civility from its employees" and an employee's use of profanity, vulgar language, or offensive language "in a confrontational, disrespectful, or name-calling context may be recognized as misconduct" disqualifying the employee from receiving unemployment insurance benefits. *Henecke v. Iowa Dep't of Job Serv.*, 533 N.W.2d 573 (Iowa Ct. App. 1995)

The evidence supports Luing was warned in the past he could be terminated for using profane or vulgar words in the workplace. He made the statement in a confrontational and disrespectful manner to Pacha, an employee and his supervisor. There was no evidence the use of profanity or vulgar words was common in the workplace, but even if it were, stating "Fuck no, I'm not calling you yes sir, nor sir" in a confrontational manner is not common in the workplace. Hy-Vee has established Luing engaged in work-connected misconduct under the unemployment insurance laws and benefits are denied.

While the claimant may not be eligible for regular State of Iowa unemployment insurance benefits, he may be eligible for unemployment insurance benefits that have been made available to claimants under the Coronavirus Aid, Relief, and Economic Security Act ("Cares Act"). The Pandemic Unemployment Assistance ("PUA") section of the Cares Act discusses eligibility for claimants who are unemployed due to the Coronavirus. For

claimants who are ineligible for regular unemployment insurance benefits under Iowa Code Chapter 96, they may be eligible under PUA.

Note to Claimant: If this decision determines you are not eligible for regular unemployment insurance benefits and you disagree with this decision, you may file an appeal to the Employment Appeal Board by following the instructions on the first page of this decision. Individuals who do not qualify for regular unemployment insurance benefits, but who are currently unemployed for reasons related to COVID-19 may qualify for Pandemic Unemployment Assistance (PUA). **You will need to apply for PUA to determine your eligibility under the program.** Additional information on how to apply for PUA can be found at <https://www.iowaworkforcedevelopment.gov/pua-information>.

DECISION:

The May 15, 2020 (reference 01) unemployment insurance decision denying unemployment insurance benefits is affirmed. Claimant was discharged for misconduct for a disqualifying reason. Unemployment insurance benefits are denied until the claimant has worked in and earned wages for insured work equal to ten times his weekly benefit amount after his separation date, and provided he is otherwise eligible.



Heather L. Palmer
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June 17, 2020
Decision Dated and Mailed

hlp/scn