IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

TOBIN DICKINSON
Claimant

HY-VEE INC
Employer

APPEAL NO: 13A-UI-08397-E

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/23/13
Claimant: Appellant (1)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the July 11, 2013, reference 01, decision that denied benefits. After due notice was issued, a hearing was held in Waterloo, Iowa, before Administrative Law Judge Julie Elder on October 17, 2013. The claimant participated in the hearing with Attorney Ray Walton. Sailu Timbo, Store Director; Ben Lehnertz, Manager of Perishables; Todd Conner, Produce Manager; and Ajah Anderson, Employer Representative; participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time produce clerk for Hy-Vee from March 29, 2010 to December 3, 2012. He was discharged for threatening the store director and produce manager.

On December 2, 2012, Manager of Perishables Ben Lehnertz sent the claimant home and completed an employee occurrence form for the claimant to sign after observing him close his check-out lane when a customer began placing her groceries on the conveyer belt. The claimant returned to work December 3, 2012, and told part-time Produce Clerk Doug Moore that he was going to make (Sailu Tambo, Store Director and Todd Conner, Produce Manager) “pay” if they terminated his employment due to the incident December 2, 2012. Mr. Moore interpreted the claimant’s statement as a threat and reported the situation to the employer.

After Mr. Moore told the employer about the incident December 3, 2012, the employer asked him to provide a written statement. Mr. Moore stated the claimant’s behavior had raised concerns during the previous few months because the claimant became more and more frustrated the more often he was called to the front to work as a checker. He told Mr. Moore the employer was understaffed due to “bad management.” He also told Mr. Moore that Mr. Tambo

was a “punk kid” and stated he wanted to “teach him a lesson.” Mr. Moore asked him what he might do and the claimant said if he did not work there he would “take (Mr. Tambo) out back and punch him in his face.” The claimant later apologized to Mr. Moore and explained he was frustrated about being called up to the front of the store to check.

The claimant was demoted in October 2012 and told Mr. Moore about the situation. Mr. Moore complained about the claimant’s “rants” about work and management to Mr. Conner who told the claimant not to express his negative feelings about the employer to Mr. Moore. Even after that, the claimant approached Mr. Moore to complain about the employer and when Mr. Moore told him that his talk about “attacking” anyone in the store concerned him and he did not like it the claimant stated it was “just talk” but if he did not work for the employer he would “teach (Mr. Tambo).” Mr. Moore told the claimant he could not say things like that but in his estimation the claimant did not appear to care about what he was expressing. Mr. Moore asked the claimant what he would do if the employer fired him and the claimant replied he would “kick the shit out of (Mr. Tambo). He then told Mr. Moore, “You know I could take him because I was in the Army.”

After Mr. Moore reported what the claimant said December 3, 2012, the employer decided to terminate the claimant’s employment. The employer contacted the local police department to request an officer be present when it notified the claimant of his discharge. The employer then met with the claimant and notified him it was terminating his employment because of the threats he made against Mr. Tambo and Mr. Conner. The claimant did not deny or admit making the statement. He signed a document banning him from entering any Hy-Vee store in the future.

The claimant received an employee occurrence form January 17, 2011, after he expressed his frustrations about his job and the employer to a customer.

Mr. Moore was not present to testify at the hearing. The claimant did subpoena him but the employer was unable to contact him because the phone number it had for him was disconnected and he was not scheduled to work from the time the employer received the subpoena to the time of the hearing.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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.

871 IAC 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.

The claimant made a threat against Mr. Tambo and Mr. Conner December 3, 2012, in stating if he was discharged for the customer service incident December 2, 2012, he would "make (them) pay." The claimant had made other inappropriate remarks to Mr. Moore about Mr. Tambo and because of the claimant's rants and obvious, growing, frustration about being called to work as a checker and being sent home the day before, Mr. Moore took the threat seriously and reported it to the employer. Due to the claimant's past behavior and comments, as reported by Mr. Moore, the employer also took the threat seriously and made the decision to discharge the claimant.

While the claimant believes the employer was "out to get (him)," and he was frustrated about frequently being called away from his produce job to work as a checker, the employer's number one priority is customer service and that is reflected in its training. The employer explained its customer service expectations to the claimant on previous occasions but he continued to inappropriately express his frustrations about being directed to work as a checker in a threatening manner. Unfortunately, in today's climate employers have little choice but to take threats seriously, and his last threat, stating he would make Mr. Tambo and Mr. Conner "pay" if he was terminated, coupled with his previous threatening and inappropriate statements about Mr. Tambo, prompted the employer to take the unusual step of having a police officer present during the termination meeting.

Most of the testimony provided by the employer was based on Mr. Moore's verbal and written statements to the employer. While the claimant correctly noted Mr. Moore's statements as presented were hearsay, under McConnell v. Iowa Department of Job Service, 327 N.W.2d 234 (Iowa 1982), hearsay evidence is generally admissible in an administrative proceeding and under federal administrative law may constitute substantial evidence.

Under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits are denied.

DECISION:

The July 11, 2013, reference 01, decision is affirmed. 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.

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Julie Elder
Administrative Law Judge

_____
Decision Dated and Mailed

je/pjs