

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CLIFFORD W BAKER
Claimant

APPEAL NO. 06A-UI-10555-DWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

**OC: 10/01/06 R: 01
Claimant: Respondent (1)**

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

Hy-Vee, Inc. (employer) appealed a representative's October 26, 2006 decision (reference 01) that concluded Clifford W. Baker (claimant) was qualified to receive unemployment insurance benefits, and the employer's account was subject to charge because the claimant had been discharged for nondisqualifying reasons. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on November 16, 2006. The claimant participated in the hearing. David Williams, a representative with TALX, appeared on the employer's behalf with witnesses, Brad Bain, Charlie Binau, Cole Durrett and Rich Harney. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Did the employer discharge the claimant for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on October 27, 2004. The claimant worked full-time as a night stocker. The claimant was a crew leader.

In March 2006, Durrett, an assistant manager, started talking to the claimant about the inappropriate language he used at work. The claimant appeared to use inappropriate words as part of his regular speech. The employer considered some of the claimant's statements at work unprofessional, inappropriate and profane. Durrett talked to the claimant more than once about the crude language he used at work and told him he could not talk like that at work.

In June, Harney, the store director, talked to the claimant about the inappropriate language he spoke at work and told him he had to change his ways. Harney told the claimant he could not use profanity at work. After the employer talked to the claimant in June, there is no record that Harney or any assistant manager addressed this issue again until October 1, 2006.

During the early morning hours on October 1, the claimant called a co-worker, John, to the cash registers to help the claimant check out some of customers. John was stocking shelves and

made inappropriate gestures to the claimant before he went to the register. When John arrived, he kicked the claimant's stool and then pushed the claimant more than once into the register. The claimant was upset after John pushed and shoved him. In his frustration, the claimant may have told John he was a moron. The claimant called Binau, the assistant manager on duty, and asked him to come to the registers. Binau observed the two men engaged in a verbal confrontation. Binau ultimately had John leave work early because he did believe the two should not continue to work together that shift.

Later in the morning, the employer talked to the claimant and John to find out why the two of them had engaged in a confrontation earlier. During this meeting, the claimant told the employer he did not like working with morons or difficult employees. The claimant was still upset that John had pushed and assaulted him. In the meeting John admitted he had pushed the claimant because he was frustrated with a situation at home and took his frustrations out on the claimant. As a result of this meeting, John apologized to the claimant and the two men hugged. The claimant thought this was the end of the matter.

After the claimant left the meeting, the employer continued talking to John. The employer understood that when the claimant was not present John changed his story. John then reported the claimant repeatedly taunted him and he was tired of the claimant's actions.

When the claimant reported to work later on October 1, Harney talked to him. During this conversation, the claimant realized there was a problem after Harney told him that the employer held the claimant responsible for the inappropriate behavior between John and himself earlier that morning. The employer also talked about previous problems the employer had addressed with the claimant months earlier. The claimant became upset. At times the claimant used the f-word during the meeting. After the claimant swore, Harney decided the claimant had not and would not change even though the employer previously warned the claimant about swearing at work. The words the claimant spoke appeared to be part of the claimant's everyday language. On October 1, 2006, the employer discharged the claimant because he used inappropriate "crude" words while talking to Harney even after the employer told him months before that he could not use this type of language at work.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges him for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence

or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

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. 871 IAC 24.32(8).

The employer established compelling reasons for discharging the claimant. Ultimately, the employer discharged the claimant because he again used words the employer considered inappropriate, crude and unprofessional while Harney reprimanded the claimant for allowing the situation between himself and another employee to get out of hand earlier that morning (October 1). The claimant knew the employer, especially Harney and other new management, did not tolerate the use of crude or "swear" words at work. Even though the employer concluded the claimant used these words in the normal course of his speech, the facts indicate the claimant made a concerted effort to watch his language. This conclusion is based on the fact there were no reported or documented problems between June and October 1, 2006.

On October 1, after John pushed and shoved the claimant, the claimant engaged in a hot headed incident with John. Even though the claimant was angry and upset, he called for a manager to intervene. The claimant's conduct and comments to and about the other employee when he was upset is not condoned, but his conduct at that time does not rise to the level of work-connected misconduct. The claimant used poor judgment when he made comments to John instead of remaining silent until Binou came.

When the claimant reported to work for his evening shift on October 1, the employer again questioned the claimant in the employer's office about the earlier incident. Even though the claimant believed problems between he and John had been resolved earlier in the day, the employer kept asking the claimant why John attacked him. During the meeting, the employer informed the claimant that he was being held responsible for the incident with John. The claimant became upset after the employer started discussing past problems the claimant believed had been previously resolved. During this discussion, the claimant again made some remarks that included the f-word.

While the claimant's use of the f-word is not condoned, it is clear he made the remarks out of frustration - after John pushed and shoved him and when he became upset while the employer reprimanded him. Under the facts of this case, the evidence does not establish that the claimant committed work-connected misconduct when he was in the employer's office. Therefore, as of October 26, 2006, the claimant is qualified to receive unemployment insurance benefits.

DECISION:

The representative's October 26, 2006 decision (reference 01) is affirmed. The employer discharged the claimant for compelling business reasons that do not constitute work-connected misconduct. As of October 1, 2006, the claimant is qualified to receive unemployment

insurance benefits, provided he meets all other eligibility requirements. The employer's account may be charged for benefits paid to the claimant.

Debra L. Wise
Administrative Law Judge

Decision Dated and Mailed

dlw/cs