

**IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**ALLEN J HENDERSON**  
Claimant

**HY-VEE INC**  
Employer

**APPEAL 23A-UI-11053-LJ-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 10/29/23  
Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge from Employment  
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment

**STATEMENT OF THE CASE:**

On November 30, 2023, employer Hy-Vee Inc. filed an appeal from the November 20, 2023 (reference 01) unemployment insurance decision that allowed benefits, determining the employer discharged claimant on October 28, 2023 and did not establish the discharge was for disqualifying misconduct. The Unemployment Insurance Appeals Bureau mailed notice of the hearing on December 1, 2023. Administrative Law Judge Elizabeth A. Johnson held a telephonic hearing at 8:00 a.m. on Friday, December 15, 2023. Claimant Allen J. Henderson personally participated. Employer Hy-Vee Inc. participated through witnesses Aaron Tacker, Store Manager; Jessica Cashman, Human Resource Manager; and Clifford Kozerski, Store Manager Trainee; and Kathleen Travers of Experian represented the employer. Employer's Exhibits E1 through E6 were received and admitted into the record without objection. The administrative law judge took official notice of the administrative record.

**ISSUE:**

Was the claimant discharged from employment for disqualifying, job-related misconduct?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began his employment with Hy-Vee Inc. on February 3, 2023. He worked full-time hours as a seafood manager at the Windsor Heights store until October 28, 2023, when the employer discharged him for using profanity toward the store manager.

The final incident leading to claimant's discharge occurred on October 27, 2023. That day, claimant became frustrated with Tacker after Tacker blew off a question he was trying to ask. When Tacker came back to him around five minutes later to address the question, claimant was "aggressive, hostile, and upset." (Tacker testimony.) Tacker tried to talk with claimant about the customer issue that claimant initially brought to him, but claimant became increasingly agitated and angry. Ultimately, Tacker asked claimant to come upstairs to the office to discuss the issue with him. Claimant replied, "This is bullshit," and he threw down his apron. Claimant then took off out of the seafood area and toward the front of the store to go upstairs. Tacker followed claimant through the store, which further upset claimant. At one point, while they were both at

the front of the store, claimant stated loudly something to the effect that Tacker did not need to “fucking follow” him, as he knew where he was going. (Tacker testimony; Kozerski testimony.)

Once upstairs, claimant agreed to sit down in the HR office and talk with Tacker about what upset him. Claimant said he felt Tacker had been dismissive with his questions about the customer. He also mentioned having to go to multiple different people to find an answer to his question. Claimant was still angry and continued swearing at Tacker. Twice, Tacker asked claimant to stop using profanity. Both times, claimant stopped briefly, but then his language reverted to profanity again. Ultimately, Tacker sent claimant home, as claimant was never able to calm down enough to return to work. The following day, the employer discharged him.

Tacker and Cashman together determined claimant should be discharged. Claimant had never been warned for using profanity at work or toward management in the past. However, this single incident lasted for approximately one hour. During this hour, claimant demonstrated that he could not control his behavior or deescalate himself successfully.

The employer maintains a Policy Manual and Dress Code, which claimant received, indicated he understood, and agreed to comply with on February 23, 2023. (Exhibit E4) The employer’s Company Policies specifically prohibit “Physical or verbal abuse, and use of profanity.” (Exhibit E2) As a manager, claimant is expected to follow the employer’s policies and to enforce them with subordinate employees in the seafood and meat departments.

Claimant opened the claim for unemployment insurance benefits effective October 29, 2023. He has filed no weekly continued claims for benefits since opening his claim.

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

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

Iowa Code section 96.5(2)(a) and (d) provide:

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 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.

...

d. For the purposes of this subsection, “*misconduct*” means a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee’s contract of employment. Misconduct is 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 even 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. Misconduct by an individual includes but is not limited to all of the following: ...

(2) Knowing violation of a reasonable and uniformly enforced rule of an employer.

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).

Every employer is entitled to expect civility and decency from its employees, and an employee's "use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct." *Henecke v. Iowa Dep't of Job Serv.*, 533 N.W.2d 573, 576 (Iowa App. 1995) (internal citation omitted). However, the use of profanity or offensive language is not automatically disqualifying for unemployment insurance benefits purposes. The "question of whether the use of improper language in the workplace is misconduct is nearly always a fact question... [and] must be considered with other relevant factors..." *Myers v. Employment Appeal Board*, 462 N.W.2d 734, 738 (Iowa App. 1990). A recent Employment Appeal Board decision set forth six aggravating factors to be considered when examining an employee's use of improper language: "(1) cursing in front of customers, vendors, or other third parties; (2) undermining a supervisor's authority; (3) threats of violence; (4) threats of future misbehavior or insubordination; (5) repeated incidents of vulgarity; and (6) discriminatory context." Emp. App. Bd. Hrg. No. 16B-UI-08787, at \*3 (Emp. App. Bd. pub. Oct. 21, 2016) (citing cases). The Employment Appeal Board also suggests that the general work environment is a relevant consideration in analyzing profanity. *Id.*

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

The findings of fact show how I have resolved the disputed factual issues in this case. I assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using my own common sense and experience. I find Tacker's testimony a credible account of the events as they occurred on October 27. Claimant's responses to the questions I asked him were often not directly responsive, whereas Tacker directly answered the questions I directed to him. Additionally, I did not find it credible that numerous employees swore at management in the store without repercussions, as claimant was unable to give any specific examples of this behavior.

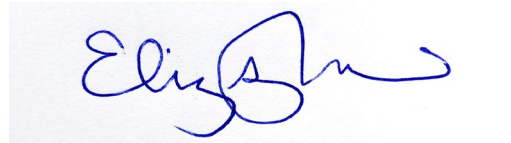
The employer has proven through credible testimony that claimant swore repeatedly at Tacker, the store manager, without the sort of provocation that would lead a reasonable person to act similarly. He continued using profanity toward Tacker after being directly asked not to, and he

demonstrated an inability to control his own conduct. This conduct violated the employer's work rules and constituted a material breach of the duties he had to his employer as a manager. The employer has proven claimant was discharged for disqualifying, job-related misconduct. Benefits are withheld.

Claimant has filed no claims and received no benefits since his separation. The issues of overpayment and chargeability are moot.

**DECISION:**

The November 20, 2023 (reference 01) unemployment insurance decision is reversed. The employer discharged claimant from employment due to job-related misconduct. Benefits are withheld until such time as the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The issues of overpayment and chargeability are moot.



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Elizabeth A. Johnson  
Administrative Law Judge

December 18, 2023  
Decision Dated and Mailed

lj/scn

**APPEAL RIGHTS.** If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Iowa Employment Appeal Board  
6200 Park Avenue Suite 100  
Des Moines, Iowa 50321  
Fax: (515)281-7191  
Online: eab.iowa.gov**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

**AN APPEAL TO THE BOARD SHALL STATE CLEARLY:**

- 1) The name, address, and social security number of the claimant.
- 2) A reference to the decision from which the appeal is taken.
- 3) That an appeal from such decision is being made and such appeal is signed.
- 4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf> or by contacting the District Court Clerk of Court <https://www.iowacourts.gov/iowa-courts/court-directory/>.

**Note to Parties:** YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

**Note to Claimant:** It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

**SERVICE INFORMATION:**

A true and correct copy of this decision was mailed to each of the parties listed.

**DERECHOS DE APELACIÓN.** Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Iowa Employment Appeal Board  
6200 Park Avenue Suite 100  
Des Moines, Iowa 50321  
Fax: (515)281-7191  
En línea: eab.iowa.gov**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

**UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:**

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiriera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que se encuentra en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf> o comunicándose con el Tribunal de Distrito Secretario del tribunal <https://www.iowacourts.gov/iowa-courts/court-directory/>.

**Nota para las partes:** USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

**Nota para el reclamante:** es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

**SERVICIO DE INFORMACIÓN:**

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.