

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**KEVIN S DOUGHERTY**  
Claimant

**HY-VEE INC**  
Employer

**APPEAL 19A-UI-05901-JC-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 06/23/19**  
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

The claimant/appellant, Kevin S. Dougherty, filed an appeal from the July 18, 2019 (reference 01) Iowa Workforce Development (“IWD”) unemployment insurance decision which denied benefits based upon his separation from employment. The parties were properly notified about the hearing. A telephone hearing was held on August 15, 2019. The claimant participated personally. Allison Hoyem, Roger Glisson, and Pete Comito testified at the claimant’s request. Ben Wolfe and Mike Mitchell, testified in response to a subpoena request. The employer, Hy-Vee Inc., participated through Barbara Buss, hearing representative. Colin Kamber and Jeremy Odem testified for the employer. Employer Exhibits 1, 2, and Claimant Exhibit A were admitted. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUE:**

Was the claimant discharged for disqualifying job-related misconduct?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant began employment for this employer in 1998. The claimant was employed full-time as a price and data analyst/product manager until he was discharged for insubordinate on June 26, 2019.

At the claimant’s time of hire in 1998, he was trained on employer rules and procedures. Most recently, the claimant was retrained on employer rules in 2013. The employer rules include an expectation of professionalism.

Prior to discharge, the claimant had no documented warnings related to his conduct, professionalism or insubordination. He denied knowing his job was in jeopardy. The employer stated it had spoken to the claimant “many” times about his attitude and conduct but did not provide specific details or events.

On June 24, 2019, Mr. Odem sent an email notifying employees of organizational changes. This included the claimant retaining his product management duties but also becoming the night stock manager. The claimant had not applied for the position and was not asked about the position before it was assigned to him. He did not want to work overnight which is what he interpreted would be necessary based upon the previous night shift manager's schedule. He was off work on June 25, 2019. On June 26, 2019, he had not yet discussed his concerns and unhappiness with Mr. Odem, when the final incident occurred.

Around 5:00 p.m. on June 26, 2019, the claimant and Mr. Odem were in the backroom when Mr. Odem began questioning the claimant about his product order. The employer was making efforts to reduce product orders and to reduce inventory in the backroom. The conversation escalated between Mr. Odem and the claimant with raised voices, and with the claimant moving away the inventory issue and to questioning Mr. Odem about the staff changes and his management choices. No customers or other employees witnessed the argument. No threats or profanity were used. Mr. Odem did not warn the claimant that he could face discipline if he did not calm down. At one point the claimant said in haste that maybe he would quit the employment, and Mr. Odem responded that the claimant was instead discharged.

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

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

Iowa unemployment insurance law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id.*

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).

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 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.* Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

The employer has the burden of proof in establishing disqualifying job related misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (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 (Iowa Ct. App. 1984).

In the case at hand, the claimant worked for the employer for approximately twenty-one years before discharge. He had no prior documented warnings for being insubordinate, confrontational or unprofessional and was discharged based upon a single argument with Mr. Odem in the back room on June 26, 2019.

An employer has the right to expect decency and civility 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 disqualifying the employee from receipt of unemployment insurance benefits. *Henecke v. Iowa Department of Job Service*, 533 N.W.2d 573 (Iowa App. 1995). The "question of whether the use of improper language in the workplace is misconduct is nearly always a fact question. It must be considered with other relevant factors...." *Myers v. Employment Appeal Board*, 462 N.W.2d 734, 738 (Iowa App. 1990). Aggravating factors for cases of bad language include: (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 content. *Myers v. Employment Appeal Board*, 462 N.W.2d 734, 738 (Iowa App. 1990); *Deever v. Hawkeye Window Cleaning, Inc.* 447 N.W.2d 418, 421 (Iowa Ct. App. 1989); *Henecke v. Iowa Department of Job Service*, 533 N.W.2d 573 (Iowa App. 1995); *Carpenter v. IDJS*, 401 N.W. 2d 242, 246 (Iowa App. 1986); *Zeches v. Iowa Department of Job Service*, 333 N.W.2d 735 (Iowa App. 1983).

The administrative law judge does not condone Mr. Dougherty's confrontational conduct in the backroom on June 26, 2019. It was done in a setting though that was not in front of other employees or customers, and it was very clear from the testimony that the claimant's frustration that day was not about inventory but the reorganization and move to night manager. When considering other aggravating factors, the claimant did not use profanity, vulgarities or make threats of violence or future misbehavior. No evidence was presented that he made comments

of discriminatory content. He was insubordinate inasmuch as he challenged the authority and decisions of Mr. Odem. It cannot be ignored that at no time did Mr. Odem alert the claimant that if he continued to argue or challenge his authority, that he may lose his job.

Based on the evidence presented, and in light of twenty-one years of employment with no warning for similar conduct, the administrative law judge concludes the conduct for which the claimant was discharged was an isolated incident of poor judgment and inasmuch as the employer had not previously warned the claimant about the issue leading to the separation, it has not met the burden of proof to establish that the claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning.

An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. Training or general notice to staff about a policy is not considered a disciplinary warning. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. The employer has not met its burden of proof to establish a current or final act of misconduct, and, without such, the history of other incidents need not be examined.

The question before the administrative law judge in this case is not whether the employer has the right to discharge this employee, but whether the claimant's discharge is disqualifying under the provisions of the Iowa Employment Security Law. While the decision to terminate the claimant 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 that the claimant's discharge was due to a final or current act of job related misconduct. Accordingly, benefits are allowed, provided the claimant is otherwise eligible.

The parties are reminded that under Iowa Code § 96.6-4, a finding of fact or law, judgment, conclusion, or final order made in an unemployment insurance proceeding is binding only on the parties in this proceeding and is not binding in any other agency or judicial proceeding. This provision makes clear that unemployment findings and conclusions are only binding on unemployment issues, and have no effect otherwise.

**DECISION:**

The July 18, 2019 (reference 01) initial decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. The benefits claimed and withheld shall be paid, provided he is otherwise eligible.

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Jennifer L. Beckman  
Administrative Law Judge

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Decision Dated and Mailed

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