

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TONY E FRERK
Claimant

APPEAL NO. 11A-UI-15689-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 11/06/11
Claimant: Appellant (1)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The claimant, Tony Frerk, filed an appeal from a decision dated November 29, 2011, reference 01. The decision disqualified him from receiving unemployment benefits. After due notice was issued, a hearing was held by telephone conference call on January 11, 2012. The claimant participated on his own behalf. The employer, Hy-Vee, participated by Warehouse Director Terry Graybill and Assistant Vice President of Distribution Greg McQuiston and was represented by Corporate Cost Control in the person of Bruce Burgess. Exhibits One, Two, Three, and Four admitted into the record.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Tony Frerk was employed by Hy-Vee from February 12, 1996 until November 4, 2011 as a full-time warehouse worker. He received a copy of the employee handbook, which provides for immediate discharge for any verbal or physical threats. The workplace violence policy is zero tolerance. The claimant was aware of the policy and the employer's strict enforcement, because he had been the victim of threats in March 2011 and the person threatening him was discharged.

On November 2, 2011, two employees, Todd Hatch and Bart Noe, went to their supervisor with a complaint about Mr. Frerk. The claimant had been putting pallets in the area where they were working and they asked him not to put them there because it interfered with their work. He did it again and then they began "bantering" back and forth. Mr. Frerk finally said he would get a gun and "end this problem." Mr. Hatch said, "You couldn't hit me," at which time the claimant said he would get a shotgun and "wouldn't miss."

The supervisor went to Warehouse Director Terry Graybill, who had Mr. Hatch and Mr. Noe write up statements about the incident. After this was done, he notified Assistant Vice President of Distribution Greg McQuiston and Human Resources Manager Mandy Hirschman. They met

with Mr. Frerk to discuss the incident and the statements. He admitted the statements were "close" to what he had said but "it was all in jest."

The Hy-Vee legal counsel was consulted and the instructions given were to determine if Mr. Hatch and Mr. Noe felt the claimant's statements were "in jest." They were interviewed and Mr. Noe said he knew Mr. Frerk and admitted "it might have been in jest." Mr. Hatch, on the other hand, was still "shook up" and, as he did not know Mr. Frerk, did not know if he was joking.

The decision was then made to discharge the claimant for threats of violence in the work place and he was informed on November 4, 2011, by Mr. McQuiston.

REASONING AND CONCLUSIONS OF LAW:

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 issue of threats of violence in the work place is a very serious one in the current environment. The employer's zero-tolerance policy addressed this problem to assure the safety of its employees.

Mr. Frerk asserted he was "joking" and was "misunderstood" when they were talking about guns. But, he could not explain how two separate individuals misinterpreted his statements in the same way or why they would fabricate such a story,

The record establishes the claimant made comments relating to getting a firearm and shooting co-workers. Whether or not he intended this seriously is not the issue. The other employees felt threatened enough to report the issue. The employer has the obligation to provide a safe and harassment-free work environment for all employees and the claimant's conduct interfered with its ability to do so. This is conduct not in the best interests of the employer and the claimant is disqualified.

DECISION:

The representative's decision of November 29, 2011, reference 01, is affirmed. Tony Frerk is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount in insured work, provided he is otherwise eligible.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/kjw