

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOHN P SEEL
Claimant

APPEAL NO: 14A-UI-06509-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 05/25/14

Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Hy-Vee, Inc. (employer) appealed a representative's June 16, 2014 (reference 01) decision that concluded John P. Seel (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was convened on July 16, 2014 and reconvened and concluded on August 5, 2014. The claimant participated in the hearing and was represented by John Gajdel, Attorney at Law. James Transfaglia, of Corporate Cost Control, appeared on the employer's behalf and presented testimony from three witnesses; Pat Howarth, Kristin Williams, and Anna Buzbee. During the hearing, Employer's Exhibit One and Claimant's Exhibits A and B were entered into evidence. 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:

Was the claimant discharged for work-connected misconduct?

OUTCOME:

Affirmed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on September 27, 1991. Since about October 2013 he worked full time as a security officer at the employer's Des Moines, Iowa area pharmacy fulfillment center. His last day of work was May 26, 2014. The employer discharged him on May 27, 2014. The reason asserted for the discharge was that comments he had made to female employees had made them feel uncomfortable.

The claimant had been going through a divorce which became final in about the first week of May. In February he had attempted to contact a young female technician, Buzbee, by calling her personal cell phone while they were both off duty. She did not answer the phone. He had also attempted to figure out where another young female employee lived, who he knew lived

near him. The young women were uncomfortable about this and reported it to the employer. On February 13 the employer verbally warned him that he should not be attempting to communicate with these other employees while he was off duty.

During the week the claimant's divorce became final he made a comment to one employee "I'm single now", just as an announcement, not as a part of any other conversation or suggestion that he was interested in seeing the employee socially. Also that week he was having a casual conversation with Buzbee and commented on how much his divorce had cost and that he had asked a question of his neighbor how young he could date.

These early May conversations were not reported to the employer until May 26. It is unclear what would have happened on May 26 to prompt one of the employees to make a report to the employer, but once the report was made the employer queried other employees, including Buzbee, who then reported their conversations with the claimant. The employees indicated to the employer that these conversations made them feel uncomfortable around the claimant. No other recent or specific incidents were provided other than those set out above.

Because of the concerns of the female employees, the employer determined to discharge the claimant.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. Rule 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. Rule 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is the comments made by the claimant to the female employees. Conduct asserted to be disqualifying misconduct must be both specific and current. *Greene v. Employment Appeal Board*, 426 N.W.2d 659 (Iowa App. 1988); *West v. Employment Appeal Board*, 489 N.W.2d 731 (Iowa 1992); Rule 871 IAC 24.32(8). There is no current act of misconduct as required to establish work-connected misconduct. The most recent incident in question occurred about three weeks prior to the employer's discharge of the claimant.

Even going from the date when these conversations were reported to the employer, the incidents do not arise to the level of substantial misconduct. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). The claimant's comments were not overtly sexual or harassing and were not clearly suggestive of something a reasonable person would understand to be inappropriate. The comments did not even rise to the level of innuendo. The employer has not met its burden to show disqualifying misconduct. *Cosper*, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute and the claimant is not disqualified from benefits.

DECISION:

The representative's June 16, 2014 (reference 01) decision is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

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