

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ASHLEY N OLEARY
Claimant

APPEAL NO. 14A-UI-11191-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 09/21/14
Claimant: Appellant (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Claimant filed a timely appeal from a representative's decision dated October 27, 2014, reference 04, which denied unemployment insurance benefits finding the claimant was discharged from work for using profane language on the job. After due notice was provided, a telephone hearing was held on November 18, 2014. Claimant participated. The employer participated by Ms. Alice Rose Thatch, Hearing Representative, and witnesses: Ms. Angela Handling, Human Resource Manager, and Mr. Max Dains, Store Director. Employer's Exhibits A, B, C, and D were received into evidence. Claimant's Exhibit One was received into evidence.

ISSUE:

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

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Ashley O'Leary was employed by Hy-Vee, Inc. from April 22, 2014 until October 2, 2014 when she was discharged from employment. Ms. O'Leary was employed as a part-time wine and spirits department clerk and was paid by the hour. Her immediate supervisor was Alex Belcran.

Ms. O'Leary was discharged from employment with Hy-Vee, Inc. after the employer reasonably concluded that Ms. O'Leary had engaged on at least two occasions in repeatedly using inappropriate language in the company's wine and spirits area. On September 6, 2014, a secret shopper reported that Ms. O'Leary had yelled the "F word" in the secret shopper's presence while browsing in the wine and spirits department. The secret shopper further reported that Ms. O'Leary subsequently apologized to her for her actions.

Subsequently, on September 27, 2014, a company customer who was known as a regular customer complained to company management that the preceding evening while shopping in the company's wine and spirits department she had heard the sales clerk identified as Ashley O'Leary repeatedly cursing and using the "F word" multiple times.

The employer confirmed that the description described Ms. O'Leary and was consistent with the date and time that Ms. O'Leary was on duty in the department. Based upon the repetitive nature of the complaints about Ms. O'Leary's use of inappropriate language in the work place, a decision was made to terminate Ms. O'Leary from her employment.

The employer considered the claimant's conduct to be a violation of the company's general code of conduct which requires employees to display ethics and morals and to avoid verbal abuse or profanity. Claimant had not been specifically warned following the September 6 secret shopper report, however, the store director had instructed both Ms. O'Leary and a co-worker to act professionally while performing their duties.

Ms. O'Leary admits the inappropriate use of the "F word" in the presence of the secret shopper but is unsure whether she was actually working on September 26, the date specified by the customer in her complaint to the company. It is claimant's further position that although aware of the company's code of conduct, the code does not specifically reference the use of "foul language" as a reason for termination.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits. It does.

Iowa Code § 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.

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).

In this matter the claimant was discharged after the employer had received two separate and distinct complaints about the claimant's conduct at work using profanity and repeated use of the "F word" in the presence of shoppers. The evidence establishes that Ms. O'Leary was aware of the company's code of conduct and the general expectation that employees act in a professional manner and avoid conduct at work that would discredit their employer or themselves. The code also specifically references the use of verbal abuse or profanity as a reason for disciplinary action and/or termination.

The employer sufficiently identified Ms. O'Leary as the person who was working on the night of the most recent complaint from a company customer. Although Ms. O'Leary was not specifically warned by the employer following the September 6, 2014 incident, the claimant and another worker were given a generalized warning to act professional in performing their jobs and the claimant knew or should have known that the use of vulgar language in the presence of shoppers would be in disregard of the employer's interests and the reasonable standards of behavior that the employer had a right to expect of employees.

The administrative law judge concludes that the claimant's repeated use of inappropriate language in the work place in the presence of shoppers constituted misconduct in connection with the work. Unemployment insurance benefits are, therefore, withheld until the claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount and is otherwise eligible.

DECISION:

The representative's decision dated October 27, 2014, reference 04, is affirmed. Claimant is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount and is otherwise eligible.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs