IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MITZI A BEVER
Claimant

HY-VEE INC
Employer

APPEAL NO: 10A-UI-13699-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/20/09
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Mitzi A. Bever (claimant) appealed a representative's September 27, 2010 decision (reference 03) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment with Hy-Vee, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on November 16, 2010. The claimant participated in the hearing and presented testimony from two other witnesses, Ryan Manners and Rebecca Barbour. Tim Speir of Unemployment Insurance Services appeared on the employer's behalf and presented testimony from two witnesses, Mitch Streit and Bob Hendrix. 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?

FINDINGS OF FACT:

The claimant started working for the employer on May 27, 2010. She worked full time as a baker in the employer's Council Bluffs, Iowa store. Her last day of work was August 27, 2010. The employer discharged her on that date. The reason asserted for the discharge was violation of company policy requiring clocking out to leave the property for smoke breaks.

The employer's policies prohibit employees from smoking on the store premises, including the customer parking lot area. Employees may go across the street to the employee parking area to smoke, but if they leave the immediate premises, meaning the store and the customer parking area, they are required to clock out and back in for those breaks. The claimant had received a verbal warning for failing to clock out before crossing the street for a smoke break on July 27, and she was further warned in a written warning on July 31.

On August 15 the claimant was scheduled to start work at 7:00 a.m., but clocked in early at 6:35 a.m. to assist a coworker who had a family emergency. She did not clock out until she left after she finished her shift at 1:17 p.m. However, she had left the bakery and gone out the front

of the building at 9:15 a.m., returning at 9:34 a.m. The acting manager of the bakery assumed she had gone out and crossed the street to take a smoke break and had failed to clock out to do so, and so reported this to the management, who made the same assumption. As a result, the employer discharged the claimant when she returned on August 27 from a vacation which had begun August 16 and ended August 26.

In fact, while the claimant had gone out the front of the store, she had not crossed the street or taken a smoke break. Rather, immediately outside the store she met Ms. Barbour and Mr. Manners, friends who were watching the claimant's children that day, and who had stopped by with the claimant's children to say "hi" and visit briefly. The claimant took this time as part of the break time to which she was entitled, and simply stood outside the store on the sidewalk area. The employer does not require an employee to clock out for a break unless they leave the store premises including the customer parking lot.

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. 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. 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 belief that she had left the store premises including the customer parking lot to take a smoke break, without clocking out as required and as she had been warned. 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 did in fact leave the store premises including the customer parking lot to take a smoke break. While the employer may have in good faith believed she had done so, and may

have had probable cause to support that suspicion, there is no first hand evidence to that being the case to counter the claimant's first hand testimony to the contrary. The employer has not met its burden to show disqualifying misconduct by a preponderance of the evidence. 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.

Some passing reference was made to the fact that during the hearing the claimant disclosed she had gone out to meet her friends and her children because of a message she received on her cell phone, which she had also been previously warned against using. While there might have a potential ground for discipline for the cell phone use, it is clear that those concerns arose subsequent to the decision to discharge the claimant and was not the basis of the employer's decision to discharge the claimant; that concern cannot now be used to establish misconduct. Larson v. Employment Appeal Board, 474 N.W.2d 570 (Iowa 1991). Benefits are allowed, if the claimant is otherwise eligible.

DECISION:

The representative's September 27, 2010 decision (reference 03) is reversed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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