

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JEFFERY P WISE
Claimant

HY-VEE INC
Employer

APPEAL 19A-UI-09089-JC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 10/27/19
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer/appellant, Hy-Vee Inc., filed an appeal from the November 12, 2019 (reference 01) Iowa Workforce Development (“IWD”) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on December 12, 2019. The claimant, Jeffery P. Wise, participated personally. Donna Anderson of Eyerly Ball attended as a claimant observer. Bob Wise, father of claimant, also testified. The employer participated through Barbara Buss, hearing representative with Corporate Cost Control. Jason Sheridan, store director, and Sydney Boyer, assistant manager, testified. Claimant Exhibits A and B, and Employer Exhibit 1 were admitted into evidence. 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.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any charges to the employer’s account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed part-time as a courtesy clerk and was separated from employment on September 26, 2019, when he was discharged.

When the claimant was hired, he was trained on the employer’s rules and code of conduct. The employer has a written policy which prohibits certain conduct, including “physical abuse.” (See fact-finding documents/administrative record.). Prior to discharge, the claimant had no warnings for similar conduct before discharge.

On September 20, 2019, the claimant was working near the front entrance of the store. Another employee was in the entrance way, with a cart, obstructing traffic of customers entering and exiting the building. The claimant called out to the employee to move. He was unsure if she heard him, but he went to her and placed his hands on her shoulder to move her to the side so that she was no longer in the way. The claimant denied being frustrated or angry with the employee or trying to harm her in any way. He acknowledged he could have sought manager help with the employee but was trying to help at the time. The employee reported the conduct to the employer and stated she did not want to work with him anymore. On September 20, 2019, the claimant was presented an employee consultation form in response to the incident (Claimant Exhibit A/ Fact-finding document). The claimant became upset during the consultation and did not sign it. The consult stated under the plan of action, "Jeff will not have any unwanted physical contact with any employees again for any reason. Failure to follow this will result in consequences including possible termination" (Claimant Exhibit A). No future incidents occurred after the consultation was delivered to the claimant on September 20, 2019. However, the mother of the employee who had been touched called the employer and reported her daughter didn't want to work anymore with the claimant. Because of overlapping availability of the claimant and the other employee, the employer determined it would not move the claimant to another shift, but instead discharge him.

The employer did not present any first-hand witness or evidence at the hearing. Both employer witnesses reviewed video footage and concluded the claimant being visibly frustrated when moving the employee. The video footage was not presented for the hearing. The claimant denied being upset and stated he was concerned.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$472.00, since filing a claim with an effective date of October 27, 2019. The administrative record also establishes that the employer did participate in the fact-finding interview or make a witness with direct knowledge available for rebuttal. Nancy Richardson, human resources manager, and Sydney Boyer participated.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for reasons other than misconduct, and benefits are allowed, provided he is otherwise eligible.

Iowa 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 Administrative Code rule 871-24.32(1)a provides:

"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 an at-will employment environment, an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 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. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). 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 Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

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.

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

Administrative agencies are not bound by the technical rules of evidence. *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 630 (Iowa 2000). A decision may be based upon evidence that would

ordinarily be deemed inadmissible under the rules of evidence, as long as the evidence is not immaterial or irrelevant. *Clark v. Iowa Dep't of Revenue*, 644 N.W.2d 310, 320 (Iowa 2002). Hearsay evidence is admissible at administrative hearings and may constitute substantial evidence. *Gaskey v. Iowa Dep't of Transp.*, 537 N.W.2d 695, 698 (Iowa 1995).

In this case, the claimant was discharged based upon a single incident of placing his hands on the shoulders of another employee to move her from obstructing traffic in the entryway. At the crux of the employer's case was the fact the claimant was frustrated with the coworker when he approached her. The employer witnesses allege the claimant's actions were done in aggressive manner as he was frustrated, but the employer witnesses did not personally witness the incident. No witness to the event participated in the hearing and no written statement was offered on a witness's behalf. The video footage that was reportedly reviewed by the employer before discharge was not presented.

In contrast, the claimant offered detailed, specific testimony about concern for the employee and traffic, and that he did not intend to hurt her or upset her. The employer had evidence available including video footage, and possible witnesses, which would have established if the claimant's conduct was aggressive in nature as alleged. For unknown reasons, the employer did not submit the evidence for the hearing. When evaluating the claimant's direct testimony versus the employer, which relied upon hearsay and observations of video footage not provided, the administrative law judge found the claimant's account to be more credible than the employer.

The administrative law judge does not condone the claimant touching or placing his hands on the shoulders of any employee without permission or consent, but based upon the evidence presented, his actions would not constitute "physical abuse" or egregious enough to warrant immediate discharge. The claimant's conduct was an isolated instance of poor judgment.

Further, inasmuch as the employer had warned the claimant about the final incident on September 20, 2019 and there were no incidents of alleged misconduct thereafter, it has not met the burden of proof to establish that claimant acted deliberately or negligently after the most recent warning. 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 an 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.

Because the claimant is eligible for benefits, the issues of overpayment and employer relief of charges are moot.

DECISION:

The November 12, 2019 (reference 01) initial decision is affirmed. The claimant was discharged but not for disqualifying job related misconduct. Benefits are allowed, provided he is otherwise eligible.

Jennifer L. Beckman
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Decision Dated and Mailed

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