BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building, 4TH Floor
Des Moines, Iowa 50319
eab.iowa.gov

ELARIO B MCGILL		
	:	**HEARING NUMBER:** 22B-UI-01308
Claimant	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD**
	:	**DECISION**
HY-VEE INC	:	
	:	
Employer	:	

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-2 96.3-7

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

The Employer appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The Claimant, Elario McGill, worked for Hy-Vee, Inc. from September 25, 2019 through November 10, 2021 as a full-time inventory clerk. The Employer has a policy that specifically prohibits sexual harassment in the workplace for which the Claimant signed in acknowledgment of receipt at the time of hire. (Exhibits 8 and 9)

The Employer issued a written warning to the Claimant on July 17, 2021 after he made a coworker feel uncomfortable with his inquiries about her sexual orientation. (Exhibit 7) The Claimant denied this allegation stating it was the coworker who volunteered she was a lesbian.

On November 8, 2021, HR received a report from an employee that she felt uncomfortable when the Claimant pressed up against her in the storage room. (Exhibit 4) An investigation ensued; the Employer questioned the Claimant who responded that the coworker asked him to lift her up to a high shelf to retrieve a product. He denied anything happened. The Employer sent the Claimant home pending investigation.

During the investigation, another coworker reported that the Claimant had made offensive statements about her sexual orientation and made sexual advances on November 7, 2021. Specifically, she alleged the Claimant offered her a "threesome" when he learned the coworker was a lesbian (Exhibit 3), which the Claimant denied.

The Employer tried to call the Claimant several times throughout the day on November 10, 2021, but the calls went straight to voicemail. (Exhibit 2) The Employer, initially, then left a message requesting that the Claimant come in to discuss the findings of the investigation. The subsequent calls asked for a return call by the end of the day; however, the Claimant never returned any of the Employer's calls. The next day, the Employer emailed the Claimant to inform him of his discharge due to conduct unbecoming of an employee. (Exhibit 1)

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2021) provides:

> *Discharge for Misconduct.* If the department finds the individual has been discharged for misconduct in connection with the individual's employment:
>
> The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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 Iowa Supreme court has accepted this definition as reflecting the intent of the legislature. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665, (Iowa 2000) (quoting Reigelsberger v. Employment Appeal Board, 500 N.W.2d 64, 66 (Iowa 1993).

The Employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An Employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 NW2d 661 (Iowa 2000).

The findings of fact show how we have resolved the disputed factual issues in this case. We have carefully weighed the credibility of the witnesses and the reliability of the evidence. We attribute more weight to the Employer's version of events. In the instant case, the Claimant had knowledge of the Employer's sexual harassment policy as evidenced by his signature in Exhibit 9. And even if we are to assume, the Claimant was unsure about what constituted sexual harassment, the Claimant had already received a written warning against verbal conversations of a sexual nature. The Employer provided two witness statements attesting to the Claimant unwanted sexual conversations as well as untoward physical behavior. Both witnesses expressed their uncomfortability about the Claimant's behavior towards them at work. The Claimant's actions demonstrated a disregard for the Employer's interests. Based on this record, we conclude the Employer satisfied their burden of proof.

Finally, since the Administrative Law Judge allowed benefits and in so doing affirmed a decision of the claims representative the Claimant falls under the double affirmance rule:

871 Rule of two affirmances. IAC 23.43(3)

> a. Whenever an administrative law judge affirms a decision of the representative or the employment appeal board of the Iowa department of inspections and appeals affirms the decision of an administrative law judge, allowing payment of benefits, such benefits shall be paid regardless of any further appeal.
>
> b. However, if the decision is subsequently reversed by higher authority:
>
> > (1) The protesting employer involved shall have all charges removed for all payments made on such claim.
> > (2) All payments to the claimant will cease as of the date of the reversed decision unless the claimant is otherwise eligible.
> > (3) No overpayment shall accrue to the claimant because of payment made prior to the reversal of the decision.

Thus, the Employer's account may not be charged for any benefits paid so far to the Claimant for the weeks in question, but the Claimant will ***not*** be required to repay benefits already received.

DECISION:

The administrative law judge's decision dated March 7, 2022 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for disqualifying misconduct. Accordingly, the claimant is denied benefits until such time the Claimant has worked in and has been paid wages for insured work equal to ten times the Claimant's weekly benefit amount, provided the Claimant is otherwise eligible. See, Iowa Code section 96.5(2)"a".

No remand for determination of overpayment need be made under the double affirmance rule, 871 IAC 23.43(3), but still the Employer's account may not be charged.

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James M. Strohman

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Ashley R. Koopmans

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Myron R. Linn

AMG/fnv