IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

TESSA A ROBERSON Claimant **HY-VEE INC** Employer	**APPEAL 15A-UI-03602-H2T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 08/24/14** **Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed an appeal from the March 11, 2015, (reference 06) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on June 2, 2015. Claimant participated and was represented by Andrew W. Bribriesco, Attorney at Law. Employer participated through Jason Van Vactor, Store Director; Kathy Johnson, Associate; and Brooke Alloway, Human Resources Manager and was represented by Julia Day of Corporate Cost Control. Employer's Exhibits One through Ten were entered and received into the record.

ISSUE:

Was the claimant discharged due to job-connected misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed part time as a cashier/associate beginning on September 3, 2014 at the Cedar Rapids store. She transferred to the Clarinda store where she began work on October 9, 2014. She was discharged on February 23, 2015.

On February 19 the claimant was speaking with K.J. a new employee who had just started as a cashier/associate on February 4. The claimant told K.J. that her boyfriend's mother knew her. At no time during that conversation, which was pleasant by K.J.'s description, did the claimant ever tell K.J. that she knew anything about her sexual orientation. After the first conversation, K.J. moved to the end of a bakery aisle to straighten up shelves. While she was there, the claimant spoke very loudly across the aisle from her cash register and asked K.J. if she was married. K.J. said "no." The claimant then in the same loud voice asked K.J. if she 'had a boyfriend." K.J. said "no." The claimant then said with a smirk on her face something to the effect that she knew a secret about K.J. but she was not going to tell anyone. K.J. was offended by the questions and the fact that other employees and customers could hear them and her answers. K. J. did not think the claimant was joking or that her questions and comment was funny or amusing. K. J. believed the claimant acted unprofessionally in the workplace and sought to distance herself from her.

Later that night K.J. complained to the manager on duty that she believed that the claimant was trying to intimidate her or harass her due to her sexual orientation. At no time did the K.J. and the claimant discuss sexual orientation.

On February 23 the claimant was interviewed by the store director and human resources manager. She said she was just joking with K.J. and that they had not discussed sexual orientation at all.

The claimant had only been at this store four months. She had run-ins or confrontations with at least two managers and two other coworkers besides K.J. She had been written up on January 26, 2015 for treating a manager in a disrespectful manner. Ms. Alloway had spoken to her about her rolling her eyes when speaking to coworkers.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

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).

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." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988).

The claimant is a difficult employee. She offended numerous coworkers and managers in her short stint at the store. While the administrative law judge does not conclude that the claimant was 'joking' with K.J. or that K.J. giggled when the claimant questioned her, the comment and questions alone on February 19, do not rise to the level of disqualifying misconduct. There was no mention of sexual orientation by the claimant nor was there an explicit threat made against K.J. And while K.J. may have full well understood the claimant's meaning, the claimant had no prior discipline for similar conduct, that is harassment of a coworker based upon their sexual orientation.

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, employer incurs potential liability for unemployment insurance benefits related to that separation. The conduct for which claimant was discharged was merely an isolated incident of poor judgment and inasmuch as employer had not previously warned claimant about any of the issues leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Benefits are allowed.

DECISION:

The March 11, 2015 (reference 06) decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

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Teresa K. Hillary
Administrative Law Judge

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Decision Dated and Mailed

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