

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TOBIN DICKINSON
Claimant

HY-VEE INC
Employer

APPEAL NO: 14O-UI-00263-E

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 06/23/13
Claimant: Appellant (1)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the July 11, 2013, reference 01, decision that denied benefits. After due notice was issued, a hearing was held in Waterloo, Iowa, before Administrative Law Judge Julie Elder on October 17, 2013. The claimant participated in the hearing with Attorney Ray Walton. Sailu Timbo, Store Director; Ben Lehnertz, Manager of Perishables; Todd Conner, Produce Manager; and Ajah Anderson, Employer Representative participated in the hearing on behalf of the employer. Claimant's Exhibit A was admitted into evidence.

Witness Doug Moore, Produce Clerk, was not present during the first hearing but instead provided a written statement taken at the time of the claimant's termination. While the claimant did subpoena him, the employer was unable to contact him because the phone number it had for him was disconnected and he was not scheduled to work from the time the employer received the subpoena to the time of the hearing.

The claimant appealed that decision and the Employment Appeal Board remanded the case January 8, 2014, for the purpose of taking the testimony of Mr. Moore. Another hearing was scheduled in Waterloo, Iowa, April 28, 2014. Mr. Moore and the employer's representative were present by phone, and the employer's other witnesses as listed above were there in person, and the claimant was present but the claimant's attorney was one hour late and by that time Mr. Moore had to leave to attend to another commitment and no hearing could be held on that date. A telephone hearing to take Mr. Moore's testimony was then scheduled May 29, 2014. All other participants were present but the administrative law judge was unable to reach Mr. Moore and the record was subsequently closed.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time produce clerk for Hy-Vee from March 29, 2010 to December 3, 2012. He was discharged for threatening the store director and produce manager.

On December 2, 2012, Manager of Perishables Ben Lehnertz sent the claimant home and completed an employee occurrence form for the claimant to sign after observing him close his check-out lane when a customer began placing her groceries on the conveyer belt. The claimant returned to work December 3, 2012. He had told part-time Produce Clerk Doug Moore in the past that he was going to make (Sailu Timbo, Store Director and Todd Conner, Produce Manager) "pay" if they terminated his employment. Mr. Moore interpreted the claimant's statement as a threat and reported the situation to the employer shortly before the claimant's employment was terminated.

After Mr. Moore told the employer about the claimant's threatening comments, the employer asked him to provide a written statement. Mr. Moore's December 4, 2012, statement said the claimant's behavior had raised concerns during the previous few months because the claimant became more and more frustrated the more often he was called to the front to work as a checker. He told Mr. Moore the employer was understaffed due to "bad management." He also told Mr. Moore that Mr. Timbo was a "punk kid" and stated he wanted to "teach him a lesson." Mr. Moore asked him what he might do and the claimant said if he did not work there he would "take (Mr. Timbo) out back and punch him in his face." The claimant later apologized to Mr. Moore and explained he was frustrated about being called up to the front of the store to check.

The claimant was demoted in October 2012 and told Mr. Moore about the situation. Mr. Moore complained about the claimant's "rants" about work and management to Mr. Conner who told the claimant not to express his negative feelings about the employer to Mr. Moore. Even after that, the claimant approached Mr. Moore to complain about the employer and when Mr. Moore told him that his talk about "attacking" anyone in the store concerned him and he did not like it the claimant stated it was "just talk" but if he did not work for the employer he would "teach (Mr. Timbo)." Mr. Moore told the claimant he could not say things like that but in his estimation the claimant did not appear to care about what he was expressing. Mr. Moore asked the claimant what he would do if the employer fired him and the claimant replied he would "kick the shit out of (Mr. Timbo). He then told Mr. Moore, "You know I could take him because I was in the Army."

After Mr. Moore reported what the claimant had said during the previous few months, the employer decided to terminate the claimant's employment. The employer contacted the local police department to request an officer be present when it notified the claimant of his discharge. The employer then met with the claimant and notified him it was terminating his employment because of the threats he made against Mr. Timbo and Mr. Conner. The claimant did not deny or admit making the statement. He signed a document banning him from entering any Hy-Vee store in the future.

The claimant received an employee occurrence form January 17, 2011, after he expressed his frustrations about his job and the employer to a customer.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

Iowa Code section 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 claimant made a threat against Mr. Timbo and Mr. Conner in stating if he was discharged he would "make (them) pay." The claimant had made other inappropriate remarks to Mr. Moore about Mr. Timbo and because of the claimant's rants and obvious, growing, frustration about being called to work as a checker and being sent home the day before his termination, Mr. Moore took the threats seriously and reported the claimant's comments to the employer and provided a written statement to the employer December 4, 2012. Due to the claimant's past behavior and statements, as reported by Mr. Moore, the employer also took the threats seriously and made the decision to discharge the claimant.

While the claimant believes the employer was "out to get (him)," and he was frustrated about frequently being called away from his produce job to work as a checker, the employer's number one priority is customer service and that is reflected in its training. The employer explained its customer service expectations to the claimant on previous occasions but he continued to

inappropriately express his frustrations about being directed to work as a checker in a threatening manner. Unfortunately, in today's climate employers have little choice but to take threats seriously, and his last threat, stating he would make Mr. Timbo and Mr. Conner "pay" if he was terminated, coupled with his previous threatening and inappropriate statements about Mr. Timbo, prompted the employer to take the unusual step of having a police officer present during the termination meeting.

Most of the testimony provided by the employer was based on Mr. Moore's verbal and written statements to the employer. While the claimant correctly noted Mr. Moore's statements as presented were hearsay, under McConnell v. Iowa Department of Job Service, 327 N.W.2d 234 (Iowa 1982), hearsay evidence is generally admissible in an administrative proceeding and under federal administrative law may constitute substantial evidence.

Mr. Moore was not present for the first hearing in Waterloo in October 2013 because the employer was unable to reach him to notify him of the subpoena but was on the phone and available April 28, 2014, when the claimant's attorney misread the time of the hearing and did not show up prior to the time Mr. Moore had to leave. Had the claimant's attorney been on time he could have questioned Mr. Moore at that time. Mr. Moore was not available when called for the conclusion of the hearing set for May 29, 2014.

Under these circumstances, the administrative law judge concludes the claimant's threats made over the last two to three months of his employment, coupled with his conduct, demonstrate a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits are denied.

DECISION:

The July 11, 2013, reference 01, decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/css