

**BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319**

WILLIE E DICKENS

Claimant,

and

HY-VEE INC

Employer.

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HEARING NUMBER: 14B-UI-06568

**EMPLOYMENT APPEAL BOARD
DECISION**

NOTICE

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-A

DECISION

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. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The Employment Appeal Board adopts and incorporates as its own the administrative law judge's Findings of Fact with the following modifications:

The Claimant began his employment on August 28, 2009 (10:46) as a part-time clean-up employee. (11:48; 31:46-13:59; 32:23) The Employer issued him an Employee Handbook for which he signed in acknowledgement of receipt on the day he was hired. (13:57; 20:33-21:28; 29:31-29:32; Exhibit unnumbered p. 6) Included in that handbook is the Employer's policy that prohibits, in part, verbal abuse or the use of profanity in the workplace. (21:20-21:24; 27:10-27:28) The Employer also has a policy that allows employees to address their workplace complaints by going to management with their concerns. (26:57-27:20; 30:45-30:48)

The Employer had an extensive previous conversation with Dickens in 2012 regarding behavior (19:07-19:20; 32:32-33:22) that was unbecoming of a Hy-Vee employee when he refused to stop playing his cell phone music after night management directed him to turn it off and put his phone away. The Claimant told another employee that he didn't have to comply with their directives. (17:14-17:30; 17:40-19:29) After the Employer's conversation with him, Dickens agreed to be more compliant with the night stock team. (19:22-19:26; 33:28-33:38)

The Claimant reported his complaint about the April 23rd incident to Management after he used profanity towards a co-worker. (40:19-40:32; 40:37)

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2013) 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 record establishes that the Claimant had knowledge of the Employer's policy as evidenced by his signature that he received the Employee Handbook. (13:57; 20:33-21:28; 29:31-29:32; Exhibit unnumbered p. 6) That knowledge was further enhanced by the 2012 conversation he, admittedly, had with the Employer after the incident involving his refusal to turn off his music. Although that incident occurred more than a year ago, Iowa law provides that past acts and warnings can be used to determine the magnitude of a current act when determining if misconduct occurred. See, 871 IAC 24.32(8)

Neither party considered that 2012 conversation as a warning; however, it goes to show that Dickens understood the importance of behaving in a manner that was 'becoming' of a Hy-Vee employee. Engaging in a profane outburst at a co-worker in the workplace is certainly more egregious than refusal to stop the music, and definitely not behavior becoming of a Hy-Vee employee. While it is unclear from the record whether the co-worker made a racial slur against the Claimant, it was still his obligation to report the matter to management, particularly since he was so strongly offended. His reporting the matter *after* the fact does not mitigate the gravity of his behavior. The bottom line is, based on the Claimant's knowledge of the policy and prior counseling, we can reasonably conclude that Mr. Dickens intentionally failed to follow the Employer's policy for addressing such complaints. (27:23-27:33) For this reason, we conclude that the Employer satisfied their burden of proof.

DECISION:

The administrative law judge's decision dated July 18, 2014 is **REVERSED**. The Claimant was discharged for disqualifying misconduct. Accordingly, the Claimant is denied benefits until such time he has worked in and has been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. See, Iowa Code section 96.5(2)"a".

Kim D. Schmett

John M. Priester

DISSENTING OPINION OF ASHLEY R. KOOPMANS:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the administrative law judge's decision in its entirety.

Ashley R. Koopmans