

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MEAGAN A CONNER
Claimant

APPEAL NO: 18A-UI-05733-JC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 04/22/18
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, Hy-Vee Inc., filed an appeal from the May 10, 2018, (reference 01) unemployment insurance decision that allowed benefits. After due notice, a telephone hearing was held on June 8, 2018. The claimant participated personally. The employer participated through Lisa Haroff, hearing representative. Cindy Vashon, human resources, Joel Jacobson, store director, and Erin Bolte, customer service representative, testified for the employer.

Prior to testimony, Ms. Haroff inquired as to whether a video could be sent in, stating she had just learned of it while preparing the employer for the hearing. The request was denied inasmuch as the employer had adequate knowledge of the video at the fact-finding interview, and when it appealed the May 10, 2018 decision. The hearing notice also contained instructions directing the employer to send any evidence to the Appeals Bureau prior to the hearing.

The administrative law judge took official notice of the administrative records including the fact-finding documents. Employer Exhibit 1 was admitted into evidence. 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?
Did the claimant voluntarily quit the employment with good cause attributable to the employer?
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 full-time as an assistant manager and was separated from employment

on April 10, 2018, when she was discharged for “conduct unbecoming of a Hy-Vee assistant manager” (Employer Exhibit 1).

The employer has written policies and a code of conduct which included “Lingering, horseplay, fighting, disorderly conduct... are not allowed (Employer Exhibit 1).” The claimant was made aware of the employer policies upon hire (Employer Exhibit 1).

The final incident occurred on April 9, 2018, when the claimant went to assist clerk, Erin Bolte, with a transaction. The physical space between the cash register, customer space and bagging area is small. The claimant approached Ms. Bolte, who stepped back to make room for the claimant to approach the customer and register. While the claimant was assisting the customer, Ms. Bolte turned her head to talk to another clerk.

The undisputed evidence is that after approaching Ms. Bolte’s cashier station, the claimant lifted her left leg while her backside faced Ms. Bolte. The claimant acknowledged lifting her left leg up before pushing it behind her as to stretch the leg while standing in place and reportedly made contact with Ms. Bolte. The claimant denied knowing her foot had made any contact with Ms. Bolte. Ms. Bolte and the claimant had no prior issues between each other. When the contact was made with Ms. Bolte’s shin, she did not verbally acknowledge the contact, with an “ow” or “I’m right behind you” or anything else. She did not grab her leg or inspect her shin immediately. The contact with the leg did not result in any mark or bruise or injury to Ms. Bolte.

The employer in contrast described the contact made by the claimant as a “horse kick”. The evidence is disputed as to whether it was Ms. Bolte’s left or right shin that had contact with the claimant’s shoe. The employer indicated it had surveillance footage of the incident but did not furnish it for the hearing. The employer also had still photographs captured from the incident, which both the claimant and employer reviewed, but were not provided for the hearing. The claimant did not acknowledge she had made contact or was trying to get Ms. Bolte’s attention. She did not apologize or make any comment like “come over here”, yet Ms. Bolte opined the claimant struck her in an attempt to get her attention. It was unclear why the claimant would not have simply asked Ms. Bolte to return to the cash register if her attention was needed.

The next day Ms. Bolte reported the claimant to the employer and stated she had been kicked by her and also refused a break. The employer reviewed the video footage and showed the claimant a still photo. She denied knowing she struck Ms. Bolte. The employer stated it could not have managers assaulting employees. While the claimant had other documented discipline for incidents such as cell phone use and having soda in front customer viewing areas, the employer maintained the final incident was severe enough that discharge was appropriate even if she had no prior history. Upon reviewing Ms. Bolte’s complaint, the claimant was subsequently discharged.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$364.00, since filing a claim with an effective date of April 22, 2018. 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.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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).

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.

The administrative law judge recognizes an employer has a responsibility to protect the safety of its employees, from potentially unsafe or violent conduct, in an era where violence in the workplace is real. The crux of this case is not whether the claimant made any contact with a shin of Ms. Bolte, but rather whether it was purposeful as to strike her or get her attention, or inadvertent and unintentional. Based on a careful review of the evidence presented, the evidence furnished does not support that the claimant's contact was more than accidental given the close physical proximity of the two employees as Ms. Bolte requested the claimant's help with a transaction.

Additionally, if the claimant had in fact, "horse kicked" Ms. Bolte with such force that she believed it was purposeful or intended to hurt her, it is unclear why she would not even acknowledge the contact by saying "ow" or touching her leg or checking for a mark. The evidence is disputed as to which shin even had contact with the claimant's shoe. The only witnesses to the incident who testified were the claimant and Ms. Bolte. The employer had evidence available including photographs and a video of the incident which would have been the best evidence to decipher whether the kick was in fact willful or accidental. For unknown reasons, the employer did not submit the evidence for the hearing.

In this case, the two employees had no prior history of conflict and there was no indication that the claimant would be mad or have a reason to be upset with Ms. Bolte, which may give rise to striking her. No evidence was presented by the employer that the claimant's movement of her foot/leg was coupled by any other behavior or language which would support Ms. Bolte's assertion that it was on purpose to get her attention; rather only that Ms. Bolte had turned away to talk to another employee. Further, the claimant could have reasonably just said to Ms. Bolte, "please come over here" if her attention was needed immediately. Accordingly, the administrative law judge concludes the claimant's description of lifting her foot or stepping in

place in the small space, which would have allowed her to stretch, is reasonable under the circumstances.

Based on the evidence presented, the administrative law judge concludes the employer has failed to provide sufficient details related to a final incident which support the claimant intended to kick Ms. Bolte, and therefore has not established any deliberate or willful conduct on her behalf which contributed to her discharge. At most, the claimant's contact with a shin of Ms. Bolte was accidental given the physical movement in the small space of the register, customer and Ms. Bolte. 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 job related misconduct. Accordingly, benefits are allowed provided the claimant is otherwise eligible.

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

DECISION:

The May 10, 2018, (reference 01) decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld shall be paid, provided she is otherwise eligible. The claimant has not been overpaid benefits. The employer's account is not relieved of charges associated with the claim.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/scn