IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

JOSEPH E MCMAHON Claimant **HY-VEE INC** Employer	**APPEAL 17A-UI-07298-JCT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 06/18/17** **Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting
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 filed an appeal from the July 13, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on August 3, 2017. The claimant participated personally. Martina McBride, daughter and also employee at Hy-Vee testified on the claimant's behalf. The employer participated through Bruce Burgess, hearing representative with Corporate Cost Control. Employer witnesses included Paul Hoppman, store director, Matt Burke, manager of perishables, and Rudy Ramos, assistant bakery manager. Department Exhibit D-1was admitted into evidence. The administrative law judge took official notice of the administrative records including the fact-finding documents. 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?
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 a frozen food and dairy manager and was separated from employment on May 19, 2017, when he was discharged for conduct unbecoming of an employee.

The claimant began employment in 1984. He received access to company policies and procedures, through orientation and management specific training. He was expected to enforce the policies with his subordinates. Prior to separation, the claimant had never reported any

concerns regarding management (including Mr. Hoppman) to corporate human resources. Mr. Hoppman joined the claimant's store in 2016.

On September 16, 2016, the claimant was issued a final warning in response to causing a disruption during a management meeting. The claimant's department was running a promotion that required him to utilize cooler space of another department. The claimant discovered some of his milk for the promotion had been taken out of the cooler. He went upstairs to an ongoing manager meeting, disrupted it to announce the issue, and slammed the door. Mr. Hoppman met with the claimant and reiterated the expectation of professionalism from the claimant at all times. The claimant signed the warning (Department Exhibit D-1). The claimant admitted to a stocky build, at six foot two inches and 270 pound but stated he did not mean to slam the door.

Another incident was reported to the employer, which occurred between the claimant and Joyce Tracarrio on May 10, 2017, in which the claimant was speaking to another employee and Ms. Tracarrio interrupted. Ms. Tracarrio reported the claimant yelled at her and repeatedly said, "I'm not talking to you Joyce" (Department Exhibit D-1). While the claimant was being investigated about the report from Ms. Tracarrio, the third and final incident occurred on May 15, 2017.

On May 15, 2017, the claimant was working early in the morning, when door alarms began going off. The claimant asked Shawn, a baker, whether he had left the door open, and while speaking to him, Shawn, reportedly walked away and said something to the effect of "I don't have to listen to you." The claimant responded with a raised voice, "we'll see about that." The claimant admitted to losing his temper to Mr. Ramos, and stated that if Shawn (who is an adult) was the claimant's child that he would "punch his fucking teeth in." The comment was made to Mr. Ramos and not in the presence of Shawn or guests. Upon review of the May 10 and May 15, 2017 incidents, the claimant was discharged.

The claimant opined that he was treated unfairly and cited to an incident months before in which Mr. Hoppman raised his voice at the claimant and told him if he did not get his employees up front to help bag groceries, he could look for another job. Mr. Hoppman apologized to the claimant for the incident, and the claimant did not report the incident to human resources for investigation or discipline.

The administrative record reflects that claimant has not received unemployment benefits since filing a claim with an effective date of June 18, 2017. 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.

REASONINGS 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, 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.
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> 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).

This case rests on the credibility of the parties. 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). Administrative agencies are not bound by the technical rules of evidence. *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 630 (Iowa 2000). A decision may be based upon evidence that would ordinarily be deemed inadmissible under the rules of evidence, as long as the evidence is not immaterial or irrelevant. *Clark v. Iowa Dep't of Revenue*, 644 N.W.2d 310, 320 (Iowa 2002). Hearsay evidence is admissible at administrative hearings and may constitute substantial evidence. *Gaskey v. Iowa Dep't of Transp.*, 537 N.W.2d 695, 698 (Iowa 1995).

In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). 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 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.

Cognizant of the claimant's tenure with the employer, he worked in the capacity as a frozen food and dairy manager, and as such, would be reasonably held to a higher standard, as he was in a

leadership role. The claimant should have been setting a positive example, upholding the employer's policies and promoting the employer's best interests. It cannot be ignored that given the claimant's physical stature of being six foot two and weighing 270 pounds, that losing his temper or yelling could reasonably create an intimidating environment for other employees.

The administrative law judge is not persuaded the claimant was subject to disparate application of the employer's rules and policies which require professionalism in communications with employees and managers. Regardless of how employees may have been permitted to behave before Mr. Hoppman joined the claimant's store in 2016, he was put on notice that effective September 16, 2016, he would be required to uphold the employer's values and commitment to professionalism at all times (Department Exhibit D-1). This warning was presented in response to the claimant losing his temper, disrupting a manager meeting and slamming a door. The claimant knew or should have known his job was in jeopardy.

The credible evidence presented is that the claimant was then involved in two incidents in one week in which he yelled at an employee that he was not talking to her, and then yelled at a bakery worker, Shawn, over alarms going off. The claimant then told another manager, that if Shawn was his child, that he would "punch his fucking teeth in." "The use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct, even in the case of isolated incidents or situations in which the target of abusive name-calling is not present when the vulgar statements are initially made." *Myers v. Emp't Appeal Bd.*, 462 N.W.2d 734 (Iowa Ct. App. 1990). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). Even though the comment about Shawn was not made to him directly, the claimant's aggressive and unprofessional conduct of yelling at Joyce on May 10, 2017, and then Shawn on May 15, 2017, coupled with the profanity and inappropriate comment about kicking teeth in to Mr. Ramos, violated the employer's expectations of professionalism at all times. The administrative law judge is persuaded the claimant knew or should have known his conduct was contrary to the reasonable policies the employer has a right to expect of its employees. Misconduct has been established. Benefits are denied.

Because the claimant's separation was disqualifying, benefits were originally allowed. However, he did not receive any benefits and therefore there is no overpayment in accordance with Iowa Code § 96.3(7). The administrative law judge further concludes the employer satisfactorily participated in the fact-finding interview pursuant to Iowa Code § 96.3(7), Iowa Admin. Code r. 871-24.10.

DECISION:

The July 13, 2017, (reference 01) decision is reversed. 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. The claimant has not been overpaid benefits. The employer's account is relieved of any potential charges associated with the claim.

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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

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