

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JOSHUA L FARMER
Claimant

HY-VEE INC
Employer

APPEAL 20A-UI-11468-JC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 05/24/20
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant/appellant, Joshua L. Farmer, filed an appeal from the September 9, 2020 (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was scheduled to be held on November 10, 2020. The claimant requested a postponement due to counsel having a previously scheduled conflict. The request was granted and a new hearing was scheduled for December 9, 2020.

After proper notice, a telephone hearing was conducted on December 9, 2020. The claimant participated personally and was represented by Jeffrey M. Lipman, attorney at law. Michelle Farmer attended as an observer. The employer was represented by Barbara Buss, hearing representative with Corporate Cost Control. Joe Connell and Matt Hickcox testified.

Claimant Exhibits 1-5 were admitted. 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.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed part-time as a courtesy clerk beginning in 2015 and was separated from employment on May 15, 2020, when he was discharged for a customer complaint.

When claimant was hired, he was trained on employer rules and procedures. The employee handbook reminds employees that they are expected to be friendly and courteous to customers. Claimant had no written warnings prior to discharge for similar conduct. Employer stated it verbally warned claimant about an online post made on social media in March 2016, which alleged the claimant was rude to a customer, but claimant had no recollection of the incident or being verbally counseled.

On May 13, 2020, claimant was working, and a customer reported a complaint using the employer's website. The customer alleged claimant did not say hello back to her when she walked by and greeted him, but instead muttered under his breath in a rude tone, that she observed him complaining to staff in the bakery about businesses opening too soon, and that as she left the parking lot, that he flipped her off.

Employer had video footage of claimant in the parking lot but said it was blurry. Employer had video footage of claimant in the cart area where the muttering reportedly occurred, but no audio. Employer did not show claimant the video in connection with the discharge, nor did it preserve the video, which auto-erased after approximately two and a half months. Mr. Connell was on vacation during the final incident and separation. Mr. Hickcox was off work the day of the incident. Neither witness spoke to the customer who lodged the complaint, but think that the store director did. Claimant denied the allegations and had no recollection of the customer. Claimant was subsequently discharged.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged, but not for disqualifying job-related misconduct.

Iowa law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id.*

Iowa Administrative Code rule 871-24.32(1)a provides:

"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).

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.

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).

The undisputed evidence is the claimant was discharged for a customer complaint on May 13, 2020. The employer discharged the claimant based upon a report that the claimant reportedly was rude by not responding to a greeting, was overheard talking to an employee about businesses opening too soon, and allegedly flipping her off in the parking lot.

The employer's witnesses had no first-hand knowledge of the incidents which occurred. No other employees were interviewed, who may have witnessed the incidents (or was the employee claimant reportedly complained to about businesses.) Neither employer witness spoke to the customer who lodged the complaint. Mr. Hickcox stated he reviewed video footage but acknowledged it did not have audio and the parking lot footage was grainy. The video footage that was reportedly reviewed by the employer before discharge, was not presented and had been taped over. Claimant was not shown the footage and was not questioned for his memory of events before the decision was made to discharge claimant.

The employer had evidence available including video footage, a possible witness or record of claimant's behavior on May 13, 2020, and store director (who reportedly talked to the customer), which would have been the best evidence to decipher whether the claimant did in fact engage in the alleged muttering, talking and flipping off. For unknown reasons, the employer did not submit the evidence for the hearing. When evaluating the claimant's direct testimony versus the employer, which relied upon hearsay and now erased video footage, the administrative law judge found the claimant's account to be more credible than the employer. It cannot be ignored that the claimant had no prior written warnings for customer complaints in almost five years of employment. Based on the evidence presented, the employer has failed to establish by a preponderance of the evidence that the claimant muttered under his breath rudely to a customer, engaged in unprofessional talk about businesses reopening or flipped off a customer.

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 an act of job related misconduct. Accordingly, benefits are allowed provided the claimant is otherwise eligible.

The parties are reminded that under Iowa Code § 96.6-4, a finding of fact or law, judgment, conclusion, or final order made in an unemployment insurance proceeding is binding only on the parties in this proceeding and is not binding in any other agency or judicial proceeding. This provision makes clear that unemployment findings and conclusions are only binding on unemployment issues, and have no effect otherwise.

DECISION:

The unemployment insurance decision dated September 9, 2020, (reference 01) is **REVERSED**. Claimant was discharged but not for disqualifying misconduct. Benefits are allowed, provided he is otherwise eligible.



Jennifer L. Beckman
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December 17, 2020
Decision Dated and Mailed

jlb/scn