IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DIANE R RIERSON
Claimant

HY-VEE INC
Employer

APPEAL NO: 11A-UI-08719-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 05/15/11
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Diane R. Rierson (claimant) appealed a representative's June 20, 2011 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment with Hy-Vee, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on July 25, 2011. The claimant participated in the hearing, was represented by Matthew Early, Attorney at law, and presented testimony from two other witnesses, Lorri Beaver and Marian Duer. Paula Mack of Corporate Cost Control appeared on the employer's behalf and presented testimony from four witnesses, Scott Walters, Sandra Berven, Phil Smethers, and Chris O'Hanlen. Based on the evidence, the arguments of the parties, a review of the law, and assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on September 27, 2004. She worked full time as a certified pharmacy technician in the employer's Estherville, Iowa store. Her last day of work was April 11, 2011. The employer discharged her on April 19, 2011. The reason asserted for the discharge was alleged insubordination by violating a confidentiality provision and by undermining the employer's management by being disrespectful and unprofessional after a prior warning.

The claimant and the store director, Mr. Walters, had been having difficulties for some time; Mr. Walters believed the claimant did not respect the authority of her superiors, and the claimant believed Mr. Walters was trying to make her quit. When the claimant reported to the store for her regular work on April 11, she was called into the office and given three written warnings. One was with regard to not following proper procedure to request vacation, another was for alleged insubordination due to an incident several weeks prior when the claimant did not stop

the task she was working on to assist a customer when directed to do so by the pharmacist on duty at that time, Mr. Smethers, and the last was for undermining management by speaking poorly of the store's management. As a result of these three warning, she was advised that effective immediately she was no longer going to be working in the pharmacy, but was rather being demoted to a grocery clerk position.

The written warnings were given to the claimant but were not discussed with her in any detail. She was told to go home and think about matters for a day; she responded by asking if she could have a week, which was granted. She then left the office with the warnings. As she was leaving, she accessed a voice mail message on her phone from the pharmacy manager, inquiring why she was not at work. She then went to the pharmacy and spoke with the pharmacy manager, who had not been aware that the claimant was being disciplined or being removed from the pharmacy. The claimant showed the pharmacy manager the warnings to explain why she would no longer be working in the pharmacy, and then left the store.

When she returned home, she advised her husband of the discipline she had received, and then called and spoke with a close friend and former employee of the employer, Ms. Beaver, telling her as well what had happened. Word of the claimant's removal from the pharmacy began to spread. Ms. Duer, a friend of the claimant who still worked in the pharmacy with the claimant, heard what had happened from the pharmacy manager. Later that week the store operation director received a call from a disgruntled customer complaining about what the employer had done to the claimant; the employer did not know who the customer was and did not know how the customer had know about what had happened to the claimant. Mr. Smethers also had a call later that week from a nurse practitioner who had heard what had happened, but he did not know how she knew what had happened. Mr. O'Hanlen, the regional human resources supervisor, received a number of calls later in the week from disgruntled customers complaining about what had happened with the claimant; however, he had no names and was not clear as to which of those calls came before the actual discharge and which came prior. Further, while he believed one of the customers had stated that they had been told by the claimant herself what had happened, he did not know which customer this might have been or when that call would have occurred.

One of the three warnings given to the claimant on April 11 had indicated that "Diane is expected to be a positive team player. Diane will not make derogatory remarks about the management of Estherville Hy-Vee to either employees, customers, or any other person that would cause a negative light on Hy-Vee. Any and all employee consultations will be kept in the strictest of confidence. Diane will conduct herself in a professional manner with regard to Hy-Vee, its employees and customers."

Because the employer concluded that the claimant had violated this provision of the warning because of the various calls which had come in from persons who had heard the claimant had been removed from the pharmacy, when the claimant came in for a meeting prior to returning to work on April 19, the employer discharged the claimant.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right

to terminate the claimant's employment, 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 is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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. 871 IAC 24.32(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is that the claimant had violated the confidentiality provision of the warning she had been given on April 11 and as a result had also been insubordinate, disrespectful, and unprofessional. Much of the employer's position hinges upon the assumption that the calls the employer was receiving was because the claimant had been speaking to these customers herself. The claimant denied speaking to any customers or in orchestrating any effort to have persons call the employer to complain about the discipline which had been given to her, nor making derogatory statements. 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 in fact spoke to customers about her discipline or instigated an effort to have customers call the employer on her behalf, or made derogatory statements to customers about the employer.

The language in the warning that the "employee consultations will be kept in the strictest of confidence" does not specify whose duty it was to keep the employee consultations confidential, whether that meant the claimant, the employer, or both. It appears likely that a significant source of how the information came to be learned within the community was through the pharmacy manager. While the claimant admittedly showed the warning to the pharmacy manager, as one of the employer's managers and the person who had been the claimant's manager, the claimant reasonably concluded he was in a "need to know" position. The claimant also admittedly told her husband and her close friend Ms. Beaver; however, interpreting the generic phrase in the warning to even apply to such persons would be unreasonable and could infringe upon the claimant's own right to free speech. Further, simply by advising her husband and Ms. Beaver of the warnings and her demotion would not constitute making "derogatory remarks about the management."

The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's June 20, 2011 decision (reference 01) is reversed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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