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

WAYDE D REUTER	:	
	:	**HEARING NUMBER:** 15B-UI-12884
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
HY-VEE INC	:	
Employer.		

N O T I C E

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

D E C I S I O N

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 Claimant, Wayde D. Reuter, worked for Hy-Vee, Inc. from April 1, 1988 through August 21, 2014 as a full-time meat specialist. (14A-UI-09589 Recording @ 13:35-13:51; 21:22-21:33; *26:21-26:30) The Claimant received a corporate employee handbook that provided Employer information on the 'types of discrimination and harassment prohibited,' inter alia, for which he signed in acknowledgement of receipt. (7:36-8:05; 10:05-11:00; Exhibit B)

An employee, Laurel Morris, complained to the Employer on August 6, 2014 (16:44-16:54) that Mr. Reuter regularly engaged in making racial and gender-based slurs against customers. (15:37-15:45; 36:05-36:19; 51:10-51:50; 52:36-52:46) Mr. Reuter made such comments so often and within earshot of customers that

his fellow co-workers were surprised no one complained sooner. (Employees' written statements, Exhibit C, unnumbered p. 2) The Employer immediately initiated an investigation into the allegations. (15:13-15:27; 28:00-28:33; *27:02-27:20) The investigation was prolonged because both the Claimant and the meat department manager, Allen Helly, went on vacation, one week after the other. (18:26-18:42; 20:40-20:46; 23:07-23:17; 44:26-44:35; *27:22-27:41; *56:34-56:40) Mr. Helly returned on August 11, 2014. (28:00-28:33)

After several employees were interviewed, including Mr. Reuter (28:41-29:10; 30:06-30:52), Lanie Cooney (Human Resource Supervisor) submitted her notes to the Employer, which contained numerous allegations that the Claimant used multiple racial epithets referring to customers while working within the meat department. (23:07-23:41; 29:29-29:56; 32:00-32:10) When interviewed, the Claimant initially denied specifically using the n-word; then stated that if he did, he didn't mean it. (33:22-33:55; *13:55-14:17; *14:39-14:43; *28:12-28:47) When asked about other racially derogatory remarks he admitted he may have, but didn't remember. (34:05-34:35; *40:30-40:40; *41:40) Mr. Schumacher, the Claimant's former supervisor, was also interviewed and denied ever hearing the Claimant make any derogatory comments. (**18:10-18:28)

At the conclusion of the investigation, the Employer placed Reuter on a disciplinary suspension with pay on August 20th, 2014 pending his meeting with the Employer. (19:52-20:18; *36:42-36:57) The next day, the Employer met with Reuter and discharged him for '…conduct unbecoming of a Hy-Vee employee in violation of corporate store policies…," which was read to him verbatim from the termination report. (7:08-7:33; 8:09-8:54; 14:03; *14:55-14:59; *26:55-27:00; *55:53-56:19; Exhibit C) The Employer asked the Claimant to sign the termination report for which he refused. (*56:19-56:20)

* 14A-UI-09589 - 2nd recording
**14R-UI-12884 recording

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 findings of fact show how we have resolved the disputed factual issues in this case. We have carefully weighed the credibility of the witnesses and the reliability of the evidence. We attribute more weight to the Employer's version of events.

The Employer provided numerous accounts of the Claimant's 'unbecoming' behavior, which violated Hy-Vee's policy as it related to harassment and discrimination in the workplace. (Exhibit B) The Claimant had knowledge of this policy, and acknowledged during the hearing that making the derogatory remarks for which he was accused was wrong and inappropriate. The fact that the Claimant never unequivocally said 'yes,' when asked if he used racially derogatory language regarding customers in the meat department, is not probative that the Claimant did not engage in such behavior. (19:16-19:37) Several witnesses attested to hearing him do so, and even his conditional admissions that "...if I said it, I didn't mean it…" or "I don't remember…" made it more probable than not that he engaged in repeated prohibited behavior as defined in the employee handbook. Although the Claimant's former immediate supervisor, Clinton Schumacher, denied ever hearing the Claimant use such language, Schumacher transferred out of the store to an out-of-state location at the end of June of 2014 (**17:22-17:40) prior to Ms. Morris' complaint against the Claimant, which occurred in August of 2014. Thus, he wouldn't necessarily be privy to the goings on the meat department; nor does his denial of ever hearing the Claimant's remarks prove that the Claimant didn't say them. Rather, a preponderance of the evidence supports that Mr. Reuter routinely used prohibited derogatory language that was based on race, gender or ethnic origin. In doing so, he demonstrated a blatant disregard of the Employer's policy against discrimination and harassment.

The Claimant's attempt to undermine the Employer's case by pointing out that the Employer waited too long to terminate him lacks merit. The Employer provided a reasonable and cogent argument for the time delay. Hy-Vee followed protocol by setting up an investigation which involved numerous employees, two of which were key witnesses (Claimant and meat department manager, Allen Helly) who were unavailable for a total of two weeks taken together. Once both men returned to the workplace and investigation notes were submitted for review, Reuter was told to go home, which was tantamount to a disciplinary suspension.

The Claimant's argument that he didn't know he was under investigation is not credible, particularly on August 20th when he was relieved of his duties pending final outcome of the investigation. (*36:42-36:57) Reuters was promptly terminated once the Human Resources supervisor returned to the office the following day. Based on this record, we conclude that the Employer satisfied its burden of proof.

DECISION:

The administrative law judge's decision dated November 4, 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".

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Kim D. Schmett

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James M. Strohman

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.

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Ashley R. Koopmans

AMG/fnv