

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ROBERTA L MURDOCK
Claimant

APPEAL NO: 12A-UI-00189-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 12/04/11
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Hy-Vee, Inc. (employer) appealed a representative's December 30, 2011 decision (reference 01) that concluded Roberta L. Murdock (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on February 6, 2012. The claimant participated in the hearing. Susan Mirise of Corporate Cost Control appeared on the employer's behalf and presented testimony from two witnesses, Brett Shelman and Willy Amos. 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?

OUTCOME:

Affirmed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on January 30, 2010. She worked full time as night kitchen supervisor in the employer's Mt. Pleasant, Iowa store. Her last day of work was December 3, 2011. The employer discharged her on that date. The reason asserted for the discharge was verbal abuse toward a minor employee.

On about December 2 the store management received a customer complaint about an incident in which the claimant made remarks about a minor (17-year-old) employee; the employer's management understood this incident had occurred only a couple days prior to December 2, but provided no first-hand testimony to that effect, and the claimant testified that the only incident of this nature had occurred in mid-October. In the incident, the subject of this particular minor employee had come up in discussion with other employees because the upcoming work

schedule had just been posted, and this minor employee had been scheduled for more hours than other regular more regular employees, who were complaining. The claimant acknowledged that she had commented within the hearing of some employees and the one customer (who happened to be the mother of another of the minor employees), that the specific employee was “worthless.” The customer believed that the claimant had said that the specific employee was “f - - - ing worthless,” but the claimant denied using any vulgarity. The claimant later apologized to the customer and the other employees for having made the comment that the specific employee was “worthless.”

The claimant had not been subject of any other prior disciplinary action. Because the employer concluded that the claimant had used vulgar language in her reference to the specific employee, 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 the assertion that she used vulgar language in her reference to the specific employee, within the hearing of other employees and a customer. The claimant testified under oath that while she did inappropriately call the specific employee “worthless,” she did not use vulgar language. The employer relies exclusively on second-hand information; however, without that information being provided first-hand, the administrative law judge is unable to ascertain whether the employer's sources might have been mistaken, whether they actually observed the entire time, whether they are credible, or whether the employer's witness might have misinterpreted or misunderstood aspects of their reports. 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 did use vulgar language in her reference to the specific employee. 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 December 30, 2011 decision (reference 01) is affirmed. 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.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs