IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

PAT SORENSON
Claimant

HY-VEE INC
Employer

APPEAL NO: 11A-UI-09988-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/26/11
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Hy-Vee, Inc. (employer) appealed a representative's July 18, 2011 decision (reference 01) that concluded Pat Sorenson (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 August 22, 2011. The claimant participated in the hearing and was represented by Diane Wilson, Attorney at Law. Alice Rose Thatch of Corporate Cost Control appeared on the employer's behalf and presented testimony from four witnesses, Lieh Ann Abrahamson, Colleen Zander, Tracy Kading, and Steve Mercer. During the hearing, Employer's Exhibit One was entered into evidence. Based on the evidence, the arguments of the parties, 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 work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on May 15, 1993. She worked full time as a baker in the employer's Mason City, Iowa store. Her last day of work was June 2, 2011. The employer discharged her on that date. The reason asserted for the discharge was inability to follow company policy and insubordination.

The claimant had been given final warnings for policy issues including insubordination concerns in 2004, 2007, and 2008, some related to the failure to take vacation by the time required. The most recent warning that was given to the claimant prior to discharge was that she was sent home for insubordination on May 20, 2010. On or about June 1, 2011 the store director, Mr. Kading, had cause to review the claimant's file and determined that she should have been discharged some time ago. The reason Mr. Kading reviewed the claimant's file on June 1 was that there had been an issue regarding the claimant's schedule that week; the bakery manager, Mr. Mercer, had inadvertently scheduled the claimant for two vacation days, rather than one. She had only requested vacation for May 29, and she was put down to be off for vacation on May 29 and May 30. The claimant had called in and spoken with Mr. Kading on May 30 to see

how the problem would be resolved. He suggested she go ahead and use a day of vacation to cover the day; she suggested that she work one of Mr. Mercer's scheduled days that week. Mr. Kading found this to be unreasonable and determined to more closely review the claimant's file.

The employer suggested that when the claimant came in for work on May 31 she was "not cordial" when she passed the human resources manager, Ms. Abrahmson, but there was no specific exchange or interaction between them. The employer further indicated that on June 1 the claimant had left work early without completing the assigned work; however, the claimant did not leave early and had completed all of the work given to her that day.

The employer asserted that the claimant's final "insubordination" and failure to follow company policy was that she had not taken as much vacation as she was required to have taken by June 1. The employer operates on an October 1 fiscal year start. The employer's policies provide that an employee with as much seniority and vacation as the claimant had accrued was to take at least one week (five days) within the first half of the year, by April 1. By June 1, the claimant had only taken two or three days, leaving her with eleven days to take by the end of September. The employer found this to be insubordination and a failure to follow company policy. Because of the claimant's disciplines in prior years, the employer concluded that the claimant should have been discharged when in 2011 she again failed to the required amount of vacation by the requisite date, April 1. This was carried out when the failure to take the vacation was found when the employer reviewed her file on June 1.

The claimant had previously scheduled herself to take the remaining two or three days of her first week of vacation in March 2011. However, another bakery employee had suffered a massive heart attack on or about March 3, so the claimant had cancelled her vacation days and worked to cover his shifts.

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 insubordination and a failure to follow company policy. The employer's primary concern which it classified as being the claimant's insubordination and failure to follow company policy was her failure to take the first week of her earned vacation time by April 1. Conduct asserted to be disqualifying misconduct must be both specific and current. Greene v. Employment Appeal Board, 426 N.W.2d 659 (Iowa App. 1988); West v. Employment Appeal Board, 489 N.W.2d 731 (Iowa 1992). Focusing on the employer's primary issue regarding the claimant's failure to take the required vacation time by April 1, there is no current act of misconduct as required to establish work-connected misconduct. 871 IAC 24.32(8); Greene, supra. Two months had passed between the time the claimant should have taken the vacation time and when the employer discharged of the claimant for that failure. The employer knew or should have known on or shortly after April 1 that the claimant had not taken the required amount of time by that date.

Further, "insubordination" generally means that a subordinate or employee has been deliberately disobedient or defiant in refusing or failing to carry out a specific instruction or assignment. To prove insubordination, it is necessary to show that an employee directly refused a reasonable request of a supervisor. The claimant had scheduled herself to take off the required amount of time by April 1, but had canceled that time off for a reason benefiting the employer, not because of a refusal to comply with the employer's policy. While the claimant's suggestion that she be given a day to work that week that the bakery manager had otherwise been scheduled to work was perhaps not a reasonable suggestion, and perhaps the claimant could have verified with her manager before leaving at the end of her regular shift on June 1 that there was not something else he was expecting, the employer has not established that there was anything the claimant said or did the week of June 2 which was an actual refusal or intentional failure to carry out an instruction or assignment. No current act of willful and substantial misconduct has been proven in this case. 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 July 18, 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.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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