IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

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APPEAL NO: 09A-UI-15821-BT

ADMINISTRATIVE LAW JUDGE DECISION

APPEAL RIGHTS:

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to:

Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:

The name, address and social security number of the claimant.
A reference to the decision from which the appeal is taken.
That an appeal from such decision is being made and such appeal is signed.
The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ELIZABETH ACKELSON
Claimant

HY-VEE INC
Employer

APPEAL NO: 09A-UI-15821-BT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/13/09
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

Hy-Vee, Inc. (employer) appealed an unemployment insurance decision dated October 15, 209, reference 01, which held that Elizabeth Ackelson (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on January 5, 2010. The claimant participated in the hearing with Attorney Kent Balduchi. The employer participated through Stacy Nichols, Manager of Store Operations; Cindy Taylor, Delicatessen Manager; Rosa Landers, Delicatessen Clerk; and employer representative Tim Spier. Employer's Exhibits One through Three were admitted 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:

The issue is whether the employer discharged the claimant for work-related misconduct?

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was employed as a part-time delicatessen clerk from April 22, 2000 through September 14, 2009. Prior to January 5, 2009, she had only received one disciplinary warning in 2004 for marking down a product without permission. Cindy Taylor became the delicatessen manager on January 5, 2009 and she issued the claimant a disciplinary warning on January 14, 2009. The warning advised the claimant she needs to be careful when speaking, "not so loud" and needs to stay "positive" on all matters. The claimant signed the employee consultation form but was unaware it was a disciplinary warning. The document specifically states, "Changes will be happening on how procedures are done because of new management in the department."

The deli manager met with the claimant on August 5, 2009 for a discussion about the claimant's need to "make trays." The manager documented the employee consultation form as a "final warning" but failed to have the claimant sign the final warning as typically required. The claimant was unaware the discussion was a disciplinary warning. On August 26, 2009 the

claimant had just arrived at work and the deli manager immediately told her to clean the slicer. The claimant was somewhat offended since she had just arrived at work and had not dirtied the slicer. Typically whoever uses the slicer, cleans it afterwards. The claimant said she did not want to clean it and then said, "Linda Nelson was the teacher's pet." She did clean the slicer but received a disciplinary warning for work performance and conduct. The claimant signed this document which was listed as the "2nd final warning." The warning also documented that the claimant was "caught saying that she would just stay extra long than what her schedule says in order to get extra hours."

The claimant was discharged on September 14, 2009 due to a final incident on September 11, 2009 when the claimant "upset" her co-employee, Rosa Landers, by complaining that Ms. Landers was going to use brown lettuce. The claimant was going to make sandwiches and Ms. Landers had shaved lettuce for the sandwiches, but some of the lettuce had brown spots on it. The termination document states, "Rosa felt terrible about the situation and how Liz handled herself toward Rosa. Rosa said enough is enough. I want to leave the department. Liz always puts the department and employees down." Ms. Landers began working in the deli in July 2009 and had no previous deli experience.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. 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.

Iowa Code § 96.5-2-a provides:

> An individual shall be disqualified for benefits:
>
> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
>
> a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.
>
> 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 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 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." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. Miller v. Employment Appeal Board, 423 N.W.2d 211 (Iowa App. 1988).

The claimant was discharged on September 14, 2009 because she “upset” her co-worker by not allowing the co-worker to use brown lettuce in sandwiches. Misconduct must be substantial in nature to support a disqualification from unemployment benefits. Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1982). The focus is on deliberate, intentional, or culpable acts by the employee. Id. There was no misconduct in this case. The claimant was acting in the employer’s best interests by preventing an inferior product to be provided for sale. Work-connected misconduct as defined by the unemployment insurance law has not been established in this case and benefits are allowed.

DECISION:

The unemployment insurance decision dated October 15, 2009, reference 01, is affirmed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

_____
Susan D. Ackerman
Administrative Law Judge

_____
Decision Dated and Mailed

sda/css