

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

BOUNMA J BACCAM
Claimant

HY-VEE INC
Employer

APPEAL NO. 15A-UI-09356-B2

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 08/02/15
Claimant: Appellant (1)

Iowa Code § 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated August 20, 2015, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on September 16, 2015. Claimant participated personally, and with witness Kaivanah Baccam. Employer participated by hearing officer James Tranfaglia, with witnesses Dan Anderson, Mike Bennett, David Huff and Brock Wulf. Employer's Exhibits One through Four were admitted into evidence.

ISSUE:

The issue in this matter is whether claimant was discharged for misconduct?

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant last worked for employer on July 28, 2015. Employer discharged claimant on July 31, 2015 because claimant used inappropriate language to a customer on the sales floor of a Hy-Vee in front of other customers.

Claimant worked in the Asian Express section of the Hy-Vee store. On the date in question, the store was being remodeled. This remodeling created loud noises throughout the store and in the Asian Express section. A customer went to claimant with his lunch order. Repeatedly claimant stated that he did not hear the customer. The customer glared repeatedly at claimant and stated, "You heard him, but you can't hear me?" when the claimant repeatedly asked the customer to repeat his order. The customer then went and got an assistant manager and brought her back to the Asian Express section. (That manager did not appear to testify at the hearing). After an interchange between the customer, manager, and claimant, claimant admitted to saying to the customer, "Why you gotta be such a dick?" The customer then responded, "Did you hear him? He just called me a fucking dick.

Employer investigated this incident and received written statements from three employees. One of the three employees – who was not present to testify at the hearing – stated that claimant commented, "yes, it was me. That guy is a fucking asshole. Claimant denied using any

insulting statements other than saying that the guy was acting like a dick. Claimant did admit to being very upset at this time, and making the statement in front of a number of other customers.

Claimant signed for and received an Employee's Handbook on February 20, 2012. Included in the Handbook is a statement in the Code of Conduct section stating, "using physical or verbal abuse or profanity...is not acceptable conduct." It further states, "{V}iolation of any rule, policy or procedure...will result in disciplinary action up to and including termination."

REASONING AND CONCLUSIONS OF LAW:

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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

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. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982), Iowa Code § 96.5-2-a.

In order to establish misconduct 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. Rule 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 Ct. 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 the employee's duties and obligations to the employer. Rule 871 IAC 24.32(1)a; *Huntoon* supra; *Henry* supra.

The employer bears the burden of proving that a claimant is disqualified from receiving benefits because of substantial misconduct within the meaning of Iowa Code § 96.5(2). *Myers*, 462 N.W.2d at 737. Because our unemployment compensation law is designed to protect workers from financial hardships when they become unemployed through no fault of their own, we construe the provisions "liberally to carry out its humane and beneficial purpose." *Bridgestone/Firestone, Inc. v. Emp't Appeal Bd.*, 570 N.W.2d 85, 96 (Iowa 1997). "[C]ode provisions which operate to work a forfeiture of benefits are strongly construed in favor of the claimant." *Diggs v. Emp't Appeal Bd.*, 478 N.W.2d 432, 434 (Iowa Ct. App. 1991).

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. Here, the claimant has no history of policy violations and no warnings, but the incident itself, even considering just the statements that claimant admitted to making, amounts to a serious disregard of the standards of behavior that the employer has a right to expect.

In this matter, the evidence established that claimant was discharged for an act of misconduct when claimant violated employer's policy concerning inappropriate language directed at customers. The incident which brought about the discharge, constitutes misconduct because claimant was working in a customer-oriented business. To say a customer is acting like a dick on the sales floor in front of other customers certainly would cause that customer to think less of employer. Such statements, even if the customer had acted inappropriately prior to the making of the statements, amounts to claimant disregarding the employer's interests. The administrative law judge holds that claimant was discharged for an act of misconduct and, as such, is disqualified for the receipt of unemployment insurance benefits.

DECISION:

The decision of the representative dated August 20, 2015, reference 01, is affirmed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible.

Blair A. Bennett
Administrative Law Judge

Decision Dated and Mailed

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