

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

APRIL D ROOS
Claimant

HY-VEE INC
Employer

APPEAL 16A-UI-13745-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 11/27/16
Claimant: Appellant (1)

Iowa Code § 96.5(2)a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the December 15, 2016, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on January 18, 2017. Claimant participated. Employer participated through Deb Borwig, Accounting and Human Resources Manager; Marty Collins, Head Baker and was represented by Bruce Burgess of Corporate Cost Control. Employer's Exhibit 1 was entered and received into the record.

ISSUE:

Was the claimant discharged due to job connected misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed part-time as a bakery clerk beginning on November 10, 2014 through September 27, 2016 when she was discharged. As a part-time employee the claimant was not guaranteed any particular number of hours of work per week. Her schedule was not set and would change to meet the needs of the business. Even if the claimant's work hours were cut or reduced, that does not give her permission or excuse to violate the employer's work rules regarding how employees must treat each other.

The claimant had been given a copy of the employer's handbook which put her on notice that using profanity was never acceptable. The handbook also puts employees on notice treating coworkers in a respectful manner is a core fundamental value.

The bakery manager began an extended leave of absence due to a serious illness at the beginning of September 2016. During his absence as the lead baker Mr. Collins picked up some of his duties to help keep the business operating smoothly. Additionally, as the human resources manager, Ms. Borwig, also stepped in to help cover for the bakery manager's extended absence. Ms. Borwig took over making the employee work schedule.

The claimant called in sick for one of her work shifts during the week of September 18. Another employee covered her shift for her. The claimant asked Mr. Collins to give her the work shift of the employee that covered for her so that she would not be short any work hours for the week.

Mr. Collins told her the system did not work that way and that he could not give her the work shift of another employee who had been good enough to cover for her when she was ill. Mr. Collins then told the claimant that he was not making the schedule that it was being done by Ms. Borwig.

As the head baker Mr. Collins begins work very early in the morning. When he got up on September 24 to go to work he found a text message from the claimant that he recalled said something to the effect, "f**k you, you piece of sh*t, I will have your job." The claimant had sent the text because she was angry Mr. Collins would not force another employee to give the claimant her work shift. This was not the first offensive, vulgar, profanity laced text that the claimant had sent to Mr. Collins. Mr. Collins had asked the claimant to stop sending him such texts but the claimant continued to do so. The bakery manager's wife had even gone so far as to contact Ms. Borwig to ask her to have the claimant stop texting her husband while he was off work as he was so very ill and the texts from the claimant were not aiding his recovery.

Mr. Collins showed the offensive text to Ms. Borwig the next day. Ms. Borwig recalled the claimant saying in the text to Mr. Collins, "f*ck you, you can kiss my a**." Ms. Borwig went to the store director Jeremy Hayes to report what had occurred. Mr. Hayes knowing the claimant's disciplinary history and her tendency to be loud and make a scene determined that the text message was grounds to discharge the claimant. Mr. Hayes instructed Ms. Borwig to call the claimant and discharge her over the telephone so there would not be a scene in the store in front of customers.

The claimant admits sending many profanity laced texts to Mr. Collins and the bakery manager, but her recollection was that she told Mr. Collins he "was a f**cking liar." At the hearing the claimant admitted that her text message to Mr. Collins was inappropriate.

The employer's records make clear that the claimant had been given verbal warnings prior to her discharge for discussing her wages with another employee, for leaving to pick up her child from school without punching out on the time clock and for failure to follow instructions from Mr. Collins. The employer's handbook does not require that an employee sign any verbal warnings. The employer's handbook also makes clear that even one rule infraction can result in discharge.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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).

"The use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct, even in the case of isolated incidents or situations in which the target of abusive name-calling is not present when the vulgar statements are initially made." *Myers v. EAB*, 462 N.W.2d 734 (Iowa App. 1990).

The claimant's argument that since she was at home and not on the clock when she sent the text message to her co-worker, it was not a rule violation is not credible or believable. The claimant was texting Mr. Collins with regard to a work matter. She was obligated to treat him in a respectful manner. The administrative law judge finds Mr. Collins a credible witness. He had put up with the claimant's offensive texts as long as he could before he went to human resources to seek assistance. He had asked the claimant to stop but she did not change her behavior. The claimant's actions are a violation of the conduct the employer has a right to expect from its employees and a clear violation of the work rules that had been given to her. Her text, no matter which one of the three outlined in the findings of fact was actually sent, is sufficient disqualifying misconduct to deny her receipt of unemployment insurance benefits. Benefits are denied.

DECISION:

The December 15, 2016, (reference 01), decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/rvs