IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

GARY K ZAHRT JR Claimant **HY VEE INC** Employer	**APPEAL 15A-UI-13897-DB-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 11/29/15** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the December 17, 2015, (reference 01) unemployment insurance decision that denied benefits based upon his discharge from work for conduct not in the best interest of his employer. The parties were properly notified of the hearing. A telephone hearing was held on January 11, 2016. The claimant Gary K. Zahrt, Jr. participated personally. The employer, Hy-Vee Inc., participated through representative, Sabrina Bentler, and Kelly Wieland. Employer's exhibit 1 was received and admitted.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Did claimant voluntarily quit the employment with good cause attributable to employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed part time as a dishwasher from June 12, 2014, until his employment ended on December 1, 2015, when he was discharged. Claimant's work hours varied but he typically worked between 25 and 29 hours per week. His job duties included washing dishes and busing tables.

On Friday, November 27, 2015, the claimant was arrested and charged with domestic abuse assault. He did not report to work that day because he was being held in jail. He called the store at approximately 1:00 p.m. that day and spoke to his immediate supervisor, Jennifer Pellettera, to tell her that he missed work because he was being held in jail. He reported for his next shifts on Saturday, November 28, 2015 and Sunday, November 29, 2015. When he reported back to work, he spoke to the store director, Scott Threlkeld. Mr. Threlkeld asked the claimant about the reason he was in jail on the previous Friday. The two discussed the details of the incident and Mr. Threlkeld informed the claimant that he would have to think about whether the claimant's employment would continue and that he needed to speak to another person first. Mr. Threlkeld told the claimant that he would let him know whether his employment would continue before his next shift, which was on Wednesday, December 2, 2015. On

Tuesday, December 1, 2015, Kelly Wieland called the claimant and informed him that he was being terminated for conduct unbecoming of a Hy-Vee employee.

Ms. Wieland stated that a customer approached Mr. Threlkeld after the claimant's shift ended on November 29, 2015 and said that the claimant had discussed the domestic abuse assault with him and that the claimant admitted the assault had occurred. The customer also stated that if the claimant remained employed at Hy-Vee, he would no longer continue to be a customer of that store. The employer claims that based upon that customer complaint, they were worried that they would lose customers and they then decided to terminate the claimant's employment.

The claimant denies that he ever had any communications about the domestic abuse assault incident with any customers or co-workers during his shifts on November 28 or 29, 2015. Claimant stated that he was too embarrassed to talk to anyone about it. The claimant had not received any previous warnings about inappropriate conduct with customers.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

As a preliminary matter, I find that claimant did not quit. He was discharged from employment.

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).

Further, the employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 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. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. 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. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

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.

Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.,* 391 N.W.2d 731 (Iowa Ct. App. 1986). Further, poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. Iowa Dep't Human Servs.*, 461 N.W.2d 603, 607 (Iowa Ct. App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See Iowa Code § 17A.14 (1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608. The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976).

The decision in this case rests, at least in part, upon the credibility of the parties. The employer did not present a witness with direct knowledge of the customer complaint. Mr. Threlkeld, the store manager who received the alleged complaint from the customer, did not testify. No

request to continue the hearing was made and no written statement of the customer was offered. Given the serious nature of the proceeding and the employer's allegations resulting in claimant's discharge from employment, the employer's nearly complete reliance on hearsay statements is unsettling.

The claimant testified that he never spoke to any customers about his arrest or the facts leading to his arrest. There was no investigation conducted by the employer to determine whether or not the claimant actually spoke to any customers about his arrest and charges. The employer decided to terminate the claimant's employment before even confronting the claimant about the allegations of speaking to customers inappropriately.

The employer's policy that it relies upon states that "[a]s an employee of Hy-Vee it is crucial that your behavior while working and while outside of work represents Hy-Vee in a positive manner. Therefore, any employee that is arrested, and charged with a crime, will be suspended pending the outcome of their trial. If the employee is found guilty, their employment will be terminated. Should the employee be found not guilty their employment may be reinstated. It is the employee's responsibility to notify the Human Resource Manager or the Store Director of any misconduct, immediately." The policy does not state that employees are forbidden from speaking to customers about any arrest or charges.

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.

Ms. Wieland testified that she did not believe Mr. Threlkeld, or any other supervisor, discussed with the claimant that he could not speak to customers about his arrest and charges. Further, Ms. Wieland agreed that the policy does not state that the claimant could be terminated for talking to a customer inappropriately. The claimant was not given a suspension pending the outcome of his trial, pursuant to their company policy. Ms. Wieland testified that he was not suspended because some crimes do not rise to the level of a suspension. The claimant had never had any previous warnings about inappropriate conduct with customers before. Therefore, there are no past acts or warnings to consider.

Ms. Wieland did not know the specific details of the conversation the customer stated he had with the claimant and did not know whether or not the claimant initiated this conversation. Mindful of the ruling in *Crosser*, *id.,* and noting that the claimant presented direct, first-hand testimony while the employer relied upon second-hand reports, the administrative law judge concludes that the claimant did not speak to any customers about his arrest and pending charges during his working hours on November 28 and 29. Because the claimant did not speak to any customers inappropriately, there is no current act of misconduct.

Lastly, the claimant's absenteeism on Friday, November 27, 2015 should be addressed. The claimant did not work as scheduled on this day due to the fact that he was in jail. He did not report his absence until 1:00 p.m. that day even though his shift was to start at 9:00 a.m. Iowa Admin. Code r. 871-24.25(16) provides that a claimant is deemed to have left if such claimant becomes incarcerated. However, the claimant was not terminated for his absenteeism on that

date and not deemed to have left since the employer continued to let him work the next two days. Actions that might have justified a discharge will not disqualify a claimant if those actions were not an actual reason for the discharge. *Larson v. Employment Appeal Bd.*, 474 N.W.2d 570 (Iowa 1991).

The employer has failed to meet its burden of proof of establishing disqualifying job misconduct. Therefore, benefits are allowed.

DECISION:

The December 17, 2015, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. The benefits claimed and withheld shall be paid, provided he is otherwise eligible.

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Dawn Boucher
Administrative Law Judge

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Decision Dated and Mailed

db/pjs