

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TIMOTHY FITZGERALD
Claimant

APPEAL NO: 13A-UI-00309-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 12/09/12
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Timothy Fitzgerald (claimant) appealed an unemployment insurance decision dated January 7, 2013, reference 01, which held that he was not eligible for unemployment insurance benefits because he was discharged from Hy-Vee, Inc. (employer) for work-related misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on May 13, 2013. The claimant participated in the hearing with Attorney Michael Carroll. The employer participated through Store Director Ryan Roberts; Linda Threlkeld, Assistant Vice-President of Human Resources; Suzanne Obermeier, Deli Manager; Rusty Subject, Manager of Store Operations; John Leek, Produce Manager; and Paul Jahnke, Employer Representative. Employer's Exhibits One through Four and Claimant's Exhibits A and B 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 claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

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 full time since December 27, 1989 and worked as a manager for many of those years. He was most recently working as the Chinese and Italian Express Manager until August 31, 2012, when he was discharged for violation of the code of conduct and anti-harassment policy. The employer believes employees should be treated and should treat each other with respect and dignity and the employer will not tolerate harassment or discrimination. This type of behavior could result in disciplinary action, up to and including termination. The harassment and non-discrimination policy describe specific types of harassment and includes any harassment that substantially interferes with an employee's work performance or creates an intimidating, hostile, unpleasant or offensive work environment. The claimant most recently signed for receipt of the employer's handbook on March 23, 2012 but he

had signed several acknowledgements prior to that date. He had completed ELT's Workplace harassment training and prevention program on January 28, 2005.

Each employee receives a copy of the employer's Harassment Notice Policy and Procedure but it is also posted in the break room. The employer considers harassment to be a major offense which can result in suspension or discharge. Discriminatory harassment includes physical, verbal, and nonverbal conduct that degrades, offends, is negative toward, and/or shows hostility toward an individual because of the individual's age, race, color, national origin, sex, pregnancy, sexual orientation, gender identity, religion or disability. Discriminatory conduct can include epithets, slurs, negative stereotyping, propositions, threats, intimidation, offensive language, deliberate or repeated offensive gestures or comments and hostile acts that are related to one of the above categories.

On August 30, 2012, the claimant was in the grocery store with the public and other employees when he said, "Why does Suzanne have to be such a cunt?" He was referring to Deli Manager Suzanne Obermeier and he said it to Produce Manager John Leek while in the presence of Ms. Obermeier. Mr. Leek was taken aback by the comment so failed to say anything. Ms. Obermeier was offended, shocked and hurt since she believed they had a good working relationship.

The deli counter was in between the Chinese and Italian Express counters and the claimant had parked a pallet right in front of the deli counter so customers could not approach the deli counter. Ms. Obermeier could not understand why he did not park the pallet in front of his counters since they were closed at the time of the incident. She subsequently reported the claimant's comment to the employer but the store director was out of the store at the time so no further action could be taken at that time. On the following day, Ms. Obermeier removed some of the claimant's items from a table that they shared. The claimant was not facing her but said, "You bitch!" Ms. Obermeier was extremely upset and decided that she did not have to and would not continue working in such a hostile work environment. She spoke with the employer but the employer was able to persuade her to continue working.

The claimant was subsequently questioned by the store director and the assistant vice-president of human resources. He admitted he called Ms. Obermeier a "cunt" and he was advised he was terminated from the store as of that day. However, the store director informed him that the paperwork could not be completed until the following Monday because the claimant had vacation days to be paid out. The store director likes the claimant but had to follow policy and could no longer employ him at that store. He was willing to try to help him find another position in another store before the termination became effective and he did make a few calls for the claimant. The store director did this even though the claimant had filed a complaint against him in 2011. The complaint was investigated and determined to be unfounded and the claimant subsequently apologized for filing it.

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:

<http://www.iowaworkforce.org/ui/appeals/index.html>

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 to prove the discharged employee is disqualified for benefits for misconduct. *Sallis v. Employment Appeal Bd.*, 437 N.W.2d 895, 896 (Iowa 1989). The claimant was discharged on August 31, 2012 for a violation of the code of conduct policy and the anti-harassment policy. On the day before termination, he was on the sales floor and called the deli manager a "cunt" in her presence. The claimant admitted he called the deli manager a "cunt" but contends that he was joking. Additionally, he believes the store director was out to get him but the evidence proves that the store director complied with company policy even though he may have personally felt bad about it. The Director even tried to help the claimant find other employment, which certainly would not have been done if Director was out to get him.

The claimant testified that he was addicted to pain killers and attributes his actions to his addiction. However, there is no evidence establishing he did not know what he was doing and/or could not control what he was saying. While he may have been struggling with some personal issues, it does not justify or excuse his actions.

An employer has the right to expect decency and civility from its employees and an employee's use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct disqualifying the employee from receipt of unemployment insurance benefits. *Henecke v. Iowa Department of Job Service*, 533 N.W.2d 573 (Iowa App. 1995). As a manager, the claimant is expected to uphold and enforce the employer's policies and he knew that it is completely unacceptable to call another employee a "cunt". The claimant's conduct and violation of company policy show a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties

and obligations to the employer. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

DECISION:

The unemployment insurance decision dated January 7, 2013, reference 01, is affirmed. The claimant is not eligible to receive unemployment insurance benefits because he was discharged from work for misconduct. Benefits are withheld until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/css