

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**BRIAN J DUROE**  
Claimant

**APPEAL NO. 11A-UI-09146-NT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**HY-VEE INC**  
Employer

**OC: 06/05/11**  
**Claimant: Appellant (1)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

Brian J. Duroe filed a timely appeal from a representative's decision dated July 5, 2011, reference 01, which denied unemployment insurance benefits. After due notice, a telephone hearing was held on August 3, 2011 at which time the claimant participated personally. Participating on behalf of the claimant was Mr. Toby Gordon, Attorney at Law. Participating as a witness was Ms. Brandy Grinstead, Part-Time Hy-Vee Floral Designer and claimant's roommate. Employer participated by Alice Rose-Thatch, Hearing Representative, and witnesses Dave Beach, Store Director; Linda Smith, Kitchen Manager; and Tracy McComb. Exhibits Two, Four, Five, Six and Seven were received into evidence.

**ISSUE:**

The issue is whether claimant was discharged for conduct sufficient to warrant the denial of unemployment insurance benefits.

**FINDINGS OF FACT:**

Having considered all of the evidence in the record, the administrative law judge finds: Brian Duroe began his employment with Hy-Vee, Inc. on August 7, 1989. During the course of his employment Mr. Duroe held several management positions with Hy-Vee, Inc. Claimant most recently held the position of a full-time kitchen manager trainee. Mr. Duroe was most recently paid by the hour. His immediate supervisor was the kitchen manager, Linda Smith. The claimant's employment with Hy-Vee, Inc. came to an end on June 10, 2011 when he was discharged because of a statement that he had made the previous day, June 9, 2011.

Mr. Duroe was undergoing training as a kitchen manager in hopes of obtaining a management position with Hy-Vee at the store where he was employed in Burlington, Iowa or at another Hy-Vee facility nearby. The claimant had been informed by the store director, Dave Beach, because the claimant's tenure as a kitchen manager trainee was coming to an end, the claimant would be placed in a position with the company's meat department as an hourly worker. Although this change caused the claimant's pay to be hourly instead of by salary and substantially reduced the pay, Mr. Duroe felt that he had no alternative and accepted the store

director's decision. The claimant had applied for two to three other positions within Hy-Vee and believed that he had not been given an interview because Mr. Beach had intervened.

On June 9, 2011, the claimant was in an outside grill area preparing meat as part of his kitchen trainee duties. Linda Smith, the kitchen manager, was working with Mr. Duroe that day. Ms. Smith was aware of Mr. Duroe's difficulties in finding a management position within Hy-Vee and was aware that the claimant was being transferred to the position of an hourly worker.

While working that day, Mr. Duroe asked Ms. Smith if she knew he was being transferred to the meat department in response to her question about whether the claimant wanted to go there. She heard the word, "shoot." Because Ms. Smith had not heard the entire statement, she asked Mr. Duroe what he had said and the claimant repeated: "I just want to walk upstairs and put a bullet in Dave Beach's head." Ms. Smith was startled by the remark and asked the claimant if he meant it to which the claimant responded: "Yes I do." Because Mr. Duroe appeared to be very angry and because he had repeated the threat, Ms. Smith became upset. Ms. Smith was advised by the produce manager that she should report the claimant's statement to the store director and Ms. Smith did so.

Because Ms. Smith was visibly upset and crying, Mr. Beach concluded the matter was serious and called the company corporate's office for direction. Mr. Beach was advised that the claimant should be discharged due to the threat of violence and the creation of a hostile work environment in violation of policy. Mr. Beach called the policy and initiated a no trespassing order for Mr. Duroe and terminated the claimant from employment.

It is the claimant's position that the statement attributed to him was not correct and that his actual statement was: "Someone should put a bullet in his head." Mr. Duroe agrees that he was very upset and frustrated at his reduction in pay and job status but that his statement should not have been taken more seriously than other rhetorical statements made by other employees at other times and other circumstances.

#### **REASONING AND CONCLUSIONS OF LAW:**

The question before the administrative law judge is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits. It does.

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 this matter. See Iowa Code § 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant the denial of unemployment insurance benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. of Appeals 1992).

Threats toward an employer or supervisor constitute misconduct, regardless of whether they were made in the presence of the person who is the object of the threats. See Henecke v. Iowa Department of Job Service, 533 N.W.2d 573 (Iowa App. 1995). An employer has a right to expect decency and civility from its employees and an employee's use of threats or offensive language in a confrontational, disrespectful or degrading context may be recognized as misconduct disqualifying the employee from the receipt of unemployment insurance benefits.

The evidence in the record establishes that Mr. Duroe was visibly upset because of a management decision by Mr. Beach to transfer him to an hourly position substantially reducing the claimant's pay and employment status within the company. When he made a threat to harm the store manager in the presence of his supervisor, the supervisor took the threat seriously because of the demeanor Mr. Duroe displayed at the time and because he verified to his supervisor that he meant the statement threatening to harm Mr. Beach. Because of these circumstances, Ms. Smith was reasonable in interpreting the claimant's statement to be more than rhetoric and more than the usual banter that might take place among employees. The company has a policy that prohibits employees from creating an intimidating or hostile or offensive work environment. Mr. Duroe's statements and conduct had the effect of creating an intimidating and offensive work environment for Ms. Smith who became upset by the claimant's repeated statement. The graphic nature of Mr. Duroe's statements constituted a threat towards the store manager and constituted misconduct within the meaning of the Iowa Employment Security Law. Unemployment insurance benefits are withheld.

**DECISION:**

The representative's decision dated July 5, 2011, reference 01, is affirmed. Claimant is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount and meets all other eligibility requirements.

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Terence P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

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