

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MICHELLE K ACKERSON
Claimant

APPEAL NO. 09A-UI-01186-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 12/28/08 R: 01
Claimant: Respondent (2-R)

Section 96.5(2) – Discharge

STATEMENT OF THE CASE:

The employer, Hy-Vee, filed an appeal from a decision dated January 20, 2009, reference 01. The decision allowed benefits to the claimant, Michelle Ackerson. After due notice was issued a hearing was held by telephone conference call on February 26, 2009. The claimant participated on her own behalf. The employer participated by Human Resources Manager Sue Hirschman, Manager of Store Operations Steve Schillerstrom, Deli Manager Ladonna Opdyke and was represented by UIS in the person of Daniel Speir. Exhibits One and Two, were admitted into the record.

ISSUE:

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

FINDINGS OF FACT:

Michelle Ackerson was employed by Hy-Vee from July 14, 2007 until December 30, 2008 as a part-time deli clerk. On May 1, 2008, the claimant was counseled by Human Resources Manager Sue Hirschman about “shopping on the clock.” She had collected a cart full of groceries while on the clock on April 29, 2008, took them to the check out, paid for them and then punched out. Ms. Ackerson said she had a “few minutes” left on her break and had gathered the groceries before leaving. She was warned this was unacceptable and breaks were to be taken all at the scheduled time, not “saving” some time for the end of the shift, and any shopping must be done after punching out. The warning advised her any further incidents would result in discharge.

On December 24, 2008, the claimant was scheduled to work until 5:00 p.m. but agreed to stay some extra time. Manager of Store Operations Steve Schillerstrom encountered the claimant at the check out at 6:00 p.m. He saw Ms. Ackerson coming to the check out with a cart of groceries. She left the cart at the check out and went back to the office to punch out. Then returned to the cart and checked out. In the cart were several items from the bakery and the rest of the store.

Mr. Schillerstrom reported the incident to Ms. Hirschman when the store reopened on December 26, 2008. The two of them gathered documentation regarding the time the claimant punched out and when the groceries were purchased. Her personnel file was reviewed and the next time she worked on December 30, 2008, she was discharged on December 30, 2008.

Michelle Ackerson has received unemployment benefits since filing a claim with an effective date of December 29, 2008.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 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 claimant had been advised her job was in jeopardy as a result of her shopping while on the clock. In spite of the warning she once again gathered her cart of groceries while on the clock on December 24, 2008, taking the cart to the check out and only then punching out. She had been specifically advised this was not acceptable but chose to ignore it. The employer classifies such activity as "stealing time" and had been very specific it was not to happen again. Ms. Ackerson chose to ignore the prior warning and once again violate the policy. This is a violation of the duties and responsibilities the employer has the right to expect of an employee and is conduct not in the best interests of the employer. The claimant is disqualified.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this states pursuant to section 602.10101.

The claimant has received unemployment benefits to which she is not entitled. The question of whether the claimant must repay these benefits is remanded to the UIS division.

DECISION:

The representative's decision of January 20, 2009, reference 01, is reversed. Michelle Ackerson is disqualified and benefits are withheld until she has earned ten times her weekly benefit amount, provided she is otherwise eligible.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/css