

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

TROY D GREEN
Claimant

APPEAL NO. 18A-UI-07545-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 06/17/18
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Hy-Vee (employer) appealed a representative's July 6, 2018, decision (reference 01) that concluded Troy Green (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for August 1, 2018. The claimant participated personally. The employer was represented by Bruce Burgess, Hearings Representative, and participated by Timothy McCracken, Human Resources Manager, and Joseph Smelek, General Merchandise Manager. Exhibit D-1 was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

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 hired on April 6, 2015, and at the end of his employment was working as a part-time general merchandise clerk. He signed for receipt of the employer's handbook on April 6, 2015. The employer did not issue the claimant any warnings during his employment.

The claimant's direct supervisor, Mr. Smelek, noticed the claimant was often absent from work for health issues. While the absences were for good reasons, the employer was unable to count on the claimant being at work for his scheduled shift. On May 31, 2018, the claimant asked for time off to transport his mother to post heart surgery appointments. Mr. Smelek told the claimant he was not going to schedule him for work in the future. The claimant thought he was being terminated and shook Mr. Smelek's hand. The claimant did not know that Mr. Smelek did not have the authority to terminate him and Mr. Smelek did not tell the claimant this information. Mr. Smelek told the claimant he should speak with the human resources manager. The claimant chose not to speak with the human resources manager after his termination.

The claimant filed for unemployment insurance benefits with an effective date of June 17, 2018. The employer participated personally at the fact finding interview on July 5, 2018, by Timothy McCracken and Joseph Smelek.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant did not voluntarily quit work.

Iowa Code section 96.5(1) provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980). The claimant had no intention of leaving work. He only asked his direct supervisor for a few days off. Without an intention to leave work, there can be no voluntary quit. The separation was involuntary.

The administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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 employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The claimant's direct supervisor may not have had authority to terminate the claimant but did have the authority to never schedule him for another day of work. This is in effect terminating the claimant. In considering an understanding or belief formed by a claimant, the administrative law judge considers what a reasonable person would have concluded under the circumstances. A reasonable person in the claimant's circumstances would have considered himself terminated. See *Aalbers v. Iowa Department of Job Service*, 431 N.W.2d 330 (Iowa 1988) and *O'Brien v. Employment Appeal Bd.*, 494 N.W.2d 660 (1993). The employer did not provide any evidence of job-related misconduct. The employer did not meet its burden of proof to show misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's July 6, 2018, decision (reference 01) is affirmed. The employer has not met its burden of proof to establish job-related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/rvs