

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DESIRAE E BARATTA
Claimant

APPEAL NO. 08A-UI-02575-SWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 02/03/08 R: 01
Claimant: Appellant (2)

Section 96.5-2-a - Suspension

STATEMENT OF THE CASE:

The claimant appealed an unemployment insurance decision dated March 6, 2008, reference 02, that concluded the claimant was suspended for work-connected misconduct. A telephone hearing was held on April 1, 2008. The parties were properly notified about the hearing. The claimant participated in the hearing. Tim Speir participated in the hearing on behalf of the employer with a witness, Chris Bryant.

ISSUE:

Was the claimant suspended for work-connected misconduct?

FINDINGS OF FACT:

The claimant worked full time for the employer as a registered pharmacy technician from January 25, 2007, to February 4, 2008. The employer does not have a policy for drug testing employees and does not require employees to be tested for drugs. The claimant's supervisor was the pharmacist, Carrie Dills.

In November 2007 the employer determined that drugs were missing from its inventory. As required by law, the Iowa Board of Pharmacy was contacted and a compliance officer was sent to investigate the matter. Sometime in late November or early December, the claimant was questioned about missing sleep medication. The claimant did not take the drugs. She truthfully denied taking the drugs when she was questioned and no action was taken.

On December 31, 2007, the employer again discovered some drugs missing, including a schedule II controlled substance, Hydrocodone. The store manager, Chris Bryant, reviewed surveillance video, and on one unspecified day in January 2008, the claimant reached down in an area where a missing drug was shelved and Bryant felt this was suspicious. The Iowa Board of Pharmacy was again contacted and a compliance officer was sent to investigate the matter. The compliance officer came in on January 16 and questioned Dills, the claimant, and another pharmacy technician. The compliance officer asked the claimant and the other pharmacy technician for a urine sample for a drug screen. A sample collected from the claimant in the restroom at the store.

The claimant continued to work for the employer after January 16. A couple of weeks later, the compliance officer contacted her and told her that the drug screen showed a trace of a diet drug, which was one of the drugs that was reported missing. There is no information as to how the urine sample the claimant provided was tested. The claimant had taken different diet drugs in the past that she had purchased and supplied information to the compliance officer about when and where she had purchased the drugs. The claimant informed Bryant about the results of the drug screen. She had not taken any diet drugs from the pharmacy.

Bryant contacted the corporate pharmacy managers and informed them about what had happened. Bryant was advised to suspend the claimant until the Iowa Board of Pharmacy decided something regarding the claimant. The Iowa Board of Pharmacy did not direct the employer to suspend or discharge the claimant. As of the date of the hearing, the Iowa Board of Pharmacy has not taken any action regarding the claimant.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant was suspended for work-connected misconduct as defined by the unemployment insurance 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 unemployment insurance rules provide that if the reason for the claimant's unemployment is the result of a disciplinary suspension imposed by the employer, the claimant is considered as

discharged in the issue of misconduct must be resolved. The rules specifically state that alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification. 871 IAC 24.23(9).

In this case, the claimant has been suspended not for disciplinary reasons but pending some action by the Iowa Board of Pharmacy. Even if the suspension could be considered a disciplinary suspension, the employer has failed to meet its burden of proof that the claimant took any drugs from the store.

DECISION:

The unemployment insurance decision dated March 6, 2008, reference 02, is reversed. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

Steven A. Wise
Administrative Law Judge

Decision Dated and Mailed

saw/kjw