

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

TAMMY D COOK
1502 MEMPHIS AVE #24
SPIRIT LAKE IA 51360

HY-VEE INC
c/o TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

HY-VEE INC
TALX UC EXPRESS
4100 HUBBELL AVE #78
DES MOINES IA 50317-4546

Appeal Number: 04A-UI-02415-CT
OC: 01/04/04 R: 01
Claimant: Respondent (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5(2)a – Discharge for Misconduct
Section 96.3(7) – Recovery of Overpayments

STATEMENT OF THE CASE:

Hy-Vee, Inc. filed an appeal from a representative's decision dated February 25, 2004, reference 01, which held that no disqualification would be imposed regarding Tammy Cook's separation from employment. After due notice was issued, a hearing was held by telephone on March 25, 2004. Ms. Cook participated personally. The employer participated by Dan Vondrak, Store Director; Jamie Johnson, Kitchen Manager; Marlon Eckerson, Manager of Perishables; and Royce Mertens, Assistant Grocery Manager. The employer was represented by David Williams of TALX UC Express.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all the evidence in the record, the administrative law judge finds: Ms. Cook was employed by Hy-Vee, Inc. from April 1 until November 17, 2003 as a part-time kitchen clerk. She was discharged for reporting to work smelling of alcohol. In April, a coworker reported that she suspected Ms. Cook was under the influence of alcohol. She was counseled at the time. The issue arose again in May because it was again suspected that she had reported to work after having consumed alcohol. Ms. Cook was advised that a written warning was being placed in her file because she was at work with the smell of alcohol on her breath.

On November 15, it was again reported that Ms. Cook was possibly at work under the influence of alcohol. Royce Mertens observed her shortly after she reported to work at 3:00 p.m. He noted that she appeared friendlier than usual and was leaning on others. He smelled alcohol on her breath and, therefore, sent her home for the day. On November 17, the store director spoke to her and Ms. Cook acknowledged that she had had a few drinks before coming to work. As a result of the conduct of November 15, Ms. Cook was discharged on November 17. The above matters were the sole reason for the discharge.

Ms. Cook has received a total of \$1,120.00 in job insurance benefits since filing her claim effective January 4, 2004.

REASONING AND CONCLUSIONS OF LAW:

At issue in this matter is whether Ms. Cook was separated from employment for any disqualifying reason. An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct in connection with the employment. The employer had the burden of proving disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Ms. Cook was discharged for reporting to work smelling of alcohol after being warned about such conduct. She testified that she consumed only one beer before reporting to work on November 15. She testified that she consumed the beer with lunch ending at approximately 12:00 noon. She further testified that she brushed her teeth and used mouthwash before reporting to work. The administrative law judge did not find this testimony credible. The administrative law judge is not inclined to believe that one beer consumed with a full meal could still be smelled on her breath three hours later after she had brushed her teeth and used mouthwash. Moreover, she told the employer that she had had a "few drinks" before reporting to work.

Ms. Cook had been counseled about reporting to work smelling of alcohol and had been warned in writing about such conduct. Her conduct on November 15 was clearly contrary to the standards she knew the employer expected of her by virtue of the prior warnings. If coworkers were able to detect the odor of alcohol, one would presume that customers would likely be able to smell it also. Furthermore, Ms. Cook worked in the kitchen around sharp and potentially dangerous implements and equipment. If she was at work after consuming alcohol, she presented a potential to harm herself or others. For the reasons stated herein, the administrative law judge concludes that the employer has satisfied its burden of proving disqualifying misconduct. Accordingly, benefits are denied.

Ms. Cook has received benefits since filing her claim. Based on the decision herein, the benefits received now constitute an overpayment and must be repaid. Iowa Code Section 96.3(7).

DECISION:

The representative's decision dated February 25, 2004, reference 01, is hereby reversed. Ms. Cook was discharged for misconduct in connection with her employment. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly job insurance benefit amount, provided she satisfies all other conditions of eligibility. Ms. Cook has been overpaid \$1,120.00 in job insurance benefits.

cfc/b