

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**SALLIE A WEST**  
Claimant

**APPEAL NO. 08A-UI-11380-HT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**HY-VEE INC**  
Employer

**OC: 12/09/07 R: 02**  
**Claimant: Respondent (2-R)**

Section 96.5(2)a – Discharge

**STATEMENT OF THE CASE:**

The employer, Hy-Vee, filed an appeal from a decision dated November 26, 2008, reference 02. The decision allowed benefits to the claimant, Sallie West. After due notice was issued, a hearing was held by telephone conference call on December 17, 2008. The claimant participated on her own behalf. The employer participated by Manager of Perishables Brett Shelman and was represented by Unemployment Insurance Services in the person of Daniel Spier.

**ISSUE:**

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

**FINDINGS OF FACT:**

Sallie West was employed by Hy-Vee from June 17 until October 21, 2008 as a part-time kitchen worker. Part of her job entailed driving the company van to deliver meals to customers or food to catered events. She was told by the person who trained her in June 2008 it was okay to smoke in the van as long as it was after the food had been delivered and the windows were rolled down. This was not actually the case, but the claimant never questioned higher management about it.

On July 1, 2008, Iowa law changed to prohibit smoking in any enclosed public space. No Smoking signs were posted in the store and in all the company vans. On October 17, 2008, a citizen contacted Manager of Perishables Brett Shelman and informed him one of the Hy-Vee employees had been smoking in a Hy-Vee van earlier that day. Ms. West was not scheduled to work at the same time as Mr. Shelman until October 21, 2008, at which time he questioned her about the report. He knew she had been the only one driving the company van at the time in question.

Ms. West admitted to smoking in the van even though there was a large No Smoking sign posted on the windshield. She knew smoking was prohibited and acknowledged it was simply "poor judgment" that made her smoke in a prohibited area. This was a violation of company

policy, as well as state law, which could have exposed the employer to penalties and/or sanctions. The claimant was discharged immediately.

Sallie West has received unemployment benefits since filing an additional claim with an effective date of October 26, 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 was discharged for a violation of company policy and state law. She knew smoking was not allowed in the vans, as it was clearly posted in the van itself. "Poor judgment" in knowingly violating a company policy, and state law in this case, does not constitute a "error in judgment" but willful and knowing conduct not in the best interests of the employer. This is especially pertinent because her violation of state law could have resulted in penalties or sanctions against the employer. She 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 state 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 November 26, 2008, reference 02, is reversed. Sallie West is disqualified and benefits are withheld until she has earned ten times her weekly benefit amount, provided she is otherwise eligible. The issue of whether the claimant must repay the unemployment benefits is remanded to UIS division for determination.

---

Bonny G. Hendricksmeier  
Administrative Law Judge

---

Decision Dated and Mailed

bgh/kjw