

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**CHANCE M OLIVER**  
Claimant

**APPEAL NO. 11A-UI-02280-NT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**HY-VEE INC**  
Employer

**OC: 12/12/10**  
**Claimant: Respondent (2R)**

Section 96.5-2-a – Discharge  
Section 96.3-7 – Benefit Overpayment

**STATEMENT OF THE CASE:**

Hy-Vee Inc. filed a timely appeal from a representative's decision dated February 17, 2011, reference 01, which held claimant eligible to receive unemployment insurance benefits. After due notice, a telephone hearing was held on March 24, 2011. Claimant participated personally. Participating on behalf of the employer was Ms. Paula Mack, Hearing Representative and witness, Alex Gregory. Employer's Exhibits One through Four were received into evidence.

**ISSUE:**

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

**FINDINGS OF FACT:**

The administrative law judge, having considered the evidence in the record, finds: Chance Oliver was employed by Hy-Vee Inc. from October 15, 2009 until December 17, 2010 when he was discharged from employment. Mr. Oliver held the position of part-time cashier and was paid by the hour. His immediate supervisor was Alex Gregory.

Mr. Oliver was discharged after he failed to report for scheduled work and did not provide notification on December 16, 2010. On that date Mr. Oliver was scheduled to work 10:00 a.m. until 6:00 p.m. The claimant did not call in until the end of his shift to report that he would be absent.

Company management met with Mr. Oliver on December 17, 2010. At that time Mr. Oliver stated that he had been involved in a single car accident the preceding day and had been "knocked unconscious" for an approximate four-hour period. The claimant stated that he was then driven home by a passerby but did not call in immediately to notify the employer of his impending absence due to the effects of the mishap. Mr. Gregory and another store manager who was present noted no marks on Mr. Oliver to indicate that he had been in a traffic mishap. Mr. Oliver did not provide any medical documentation stating that he did not see a doctor

because he did not have insurance. Mr. Oliver nevertheless maintained that he was suffering from a "concussion."

Because Mr. Oliver had been given a previous warning about attendance and yet had been absent on a number of occasions thereafter, the employer found Mr. Oliver's statements not to be credible and a decision was made to terminate Mr. Oliver from his employment.

It is the claimant's position that although he immediately contacted his girlfriend by telephone upon arriving home after the incident at approximately 2:00 p.m. on December 16, 2010, he did not contact the employer to report his impending absence due to his condition. It is the claimant's further position that the employer should have suspended him or discharged him prior to the incident at hand as the claimant had been absent from work on a number of occasions.

### **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.

In this matter the employer made a decision to terminate Mr. Oliver based upon his failure to report for scheduled work on December 16, 2010 and his failure to call the employer to report his impending absence as soon as reasonably possible that day. The employer noted that although Mr. Oliver stated that he had suffered a "concussion" the claimant had not visited a doctor nor showed any signs of suffering any injuries. Mr. Oliver had been previously warned

that his attendance was unacceptable and that further attendance infractions could result in increased disciplinary action up to and including termination. The employer had elected not to terminate Mr. Oliver although he had been absent on a number of occasions following his final warning. On this occasion, however, it appears that the employer did not find Mr. Oliver's statements to be credible and discharged him from employment.

The administrative law judge notes that Mr. Oliver apparently telephoned his girlfriend as soon as he arrived home at approximately 2:00 p.m. on December 16, but that the claimant did not notify the employer of his impending absence until approximately four hours later. Based upon the previous warnings that had been served upon Mr. Oliver, the administrative law judge finds that the claimant should have made every effort to provide as timely of a notice to the employer of his impending absence as possible. The administrative law judge finds the claimant's testimony that he was able to telephone his girlfriend but unable to telephone his employer to strain credibility. The claimant's failure to report for scheduled work or in the alternative to provide reasonable notice to the employer in this matter showed a disregard for the employer's reasonable expectations that the company had a right to expect of its employees under the provisions of the Employment Security Law. Unemployment insurance benefits are withheld.

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.

**DECISION:**

The representative's decision dated February 17, 2011, reference 01, is reversed. The claimant is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount and is otherwise eligible. The issue of whether the claimant must repay the unemployment benefits is remanded to the UIS Division for determination.

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Terence P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

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