

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

ELIZABETH A KRAUSE
Claimant

APPEAL NO: 18A-UI-00320-JE-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 12/11/16
Claimant: Appellant (1)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the December 29, 2017, reference 03, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on February 8, 2018. The claimant participated in the hearing. Kim Stevens, Human Resources Manager; Andy Streit, Store Director; Maggie Phelps, Pharmacy Manager; and Barbara Buss, Employer Representative; participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a part-time certified pharmacy technician for Hy-Vee from March 16, 2017 to December 1, 2017. She was discharged for attitude and performance issues.

The claimant was hired as a part-time employee. She very much wanted to be a full-time employee but her performance and attitude did not persuade the employer to elevate her to full-time status during her eight months of employment. The employer interviewed and hired three full-time employees during the claimant's employment and each time the pharmacy manager talked to the claimant regarding why she was not selected and what she needed to do in order to be considered in the future. The employer's concerns included the claimant being upset and creating a hostile work environment by complaining to other employees that they received more hours than the claimant did and that she should be a full-time employee. She did not make those statements in front of the pharmacy manager but other employees complained to the manager about the claimant's actions and the employer instructed the claimant to stop that behavior.

The employer also noted the claimant's work performance was not commensurate with her experience. On May 17, 2017, the employer conducted a performance review and stated the claimant needed to show improvement in her knowledge base as well as more motivation and

eagerness (Employer's Exhibit Five). The review noted the claimant's desire to become a full-time employee and indicated the claimant "will need to show much more improvement in skills and motivation to learn" and stated she was "known to complain frequently to other staff" (members) as well as express other frustrations openly about her hours" and those of her co-workers which upset her co-workers (Employer's Exhibit Five). On May 17, 2017, the claimant received a written warning regarding her repeated complaining about her lack of hours and wanting to be full-time (Employer's Exhibit Four). The claimant failed to attend a scheduled training "with weeks of notice after failing to confirm her time and place of said training" (Employer's Exhibit Four). The corrective plan of action stated the claimant "must show more initiative to learn new skills...discuss complaints directly with her supervisor...work to have positive relations with her co-workers rather than confrontation and uncomfortable complaining or anger toward them" (Employer's Exhibit Four). The employer also stated the claimant would be considered for any full-time positions that become available "along with all other qualified applicants" (Employer's Exhibit Four). On July 24, 2017, the claimant received a verbal warning in writing for work performance and conduct (Employer's Exhibit Three). The warning noted the claimant exhibited hostile behavior towards a co-worker regarding his work performance (Employer's Exhibit Three). The employer told her to take her concerns to the pharmacy manager or human resources instead of confronting co-workers in an unprofessional manner and in front of other employees (Employer's Exhibit Three). The warning also indicated the claimant needed to minimize her socializing and talking and stay on task and pay attention to work flow (Employer's Exhibit Three). The corrective plan of action instructed the claimant to focus on staying positive and being helpful toward co-workers, work on keeping chatter to a minimum and "continue to grow in her abilities as a technician. Failure to show improvement will be grounds for termination (Employer's Exhibit Three). On September 2, 2017, one of the pharmacists observed the claimant arrived for her shift but seemed "mentally foggy" throughout her shift. The pharmacist stated she had to be "directed repeatedly. She failed to notice when customers walked up to the counter and had to be directed to help them. She stood staring at one of the drug shelves looking for a medication for an uncommonly long period of time...The other staff that was working that day literally ran circles around her taking care of customers while she moved sluggishly the whole time performing her duties. I did consider sending her home but we were busy enough that I decided to keep her to help take care of the customers we had coming in" (Employer's Exhibit Six). On October 26, 2017, the employer conducted the claimant's employee performance review which is done on a scale of one to five with one being unsatisfactory and five being outstanding (Employer's Exhibit Two). There are six categories and the claimant accumulated three scores of two (below expectations) and three scores of three (meets expectations) (Employer's Exhibit Two).

On November 21, 2017, the claimant, who frequently texted her manager during the daytime or late evening hours, when the manager was off work, texted the manager at 10:39 p.m. and stated, "Sorry to text you so late, but I was looking at tomorrow's schedule and next Wednesday and want to know why Judi who isn't employed at (store) 1396 is getting more hours those days than I am, when I am an actual employee at 1396. Just doesn't make any sense to me" (Employer's Exhibit Eight). On November 24, 2017, the claimant texted her manager and said, "Well, you'll be glad to know that my health insurance ends 12/1 (Employer's Exhibit Eight). The manager, who had been documenting the issues involving the claimant throughout her employment, spoke to human resources and the store manager and the decision was made that the claimant's behavior, job performance and attitude had not and were not going to change and her employment was terminated December 1, 2017.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related 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 proving disqualifying misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged him for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a. Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duties and obligations to the employer. See 871 IAC 24.32(1).

The claimant wanted to be a full-time employee and apparently believed that by virtue of being a part-time employee she should automatically be the next full-time employee hired. As a result she repeatedly complained about her manager not giving her more hours and the fact that other employees had more hours than she did or additional hours she wanted. She made her

complaints to her co-workers whose hours she coveted rather than to the manager. The employer gave her numerous opportunities to improve her behavior as well as her work performance but the claimant failed to take advantage of those opportunities. The employer spoke to the claimant several times verbally, conducted two performance reviews, issued her a verbal warning in writing and a written warning all noting what job performance, attitude and behavioral areas the claimant needed to show improvement in but the claimant did not show sustained improvement. The final straw for the employer occurred when the claimant texted the manager on November 21 and November 24, 2017. The first text, sent at 10:39 p.m., complained about an employee from another store receiving hours the claimant felt could have been given to her in addition to her regular hours and the second text sarcastically commented that the manager would be "glad to know" the claimant's health insurance would end December 1, 2017. Despite regular conversations and warnings about the claimant refraining from making inappropriate comments, she continued to do so in violation of the employer's clear instructions.

Under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits are denied.

DECISION:

The December 29, 2017, reference 03, decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/scn