

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KEITH JOHNSTON
Claimant

APPEAL NO: 11A-EUCU-00685-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 11-01-09
Claimant: Respondent (1)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the August 19, 2011, reference 02, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on October 12, 2011. The claimant participated in the hearing. Heather Garrity, Manager of General Merchandise; Scott Moore, Night Stock Manager; and Alice Rose Thatch, 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 night stock clerk for Hy-Vee from May 10, 2011 to July 4, 2011. He worked from 10:00 p.m. to 6:00 a.m. The claimant was discharged for not performing his job correctly or fast enough. On May 30, 2011, Night Stock Manager Scott Moore talked to the claimant about properly facing product labels toward the aisle. On June 27, 2011, Mr. Moore again talked to the claimant about correctly facing products and speeding up his production. The claimant also left two minutes early that day without permission. On June 28, 2011, the claimant stated he was done with his work at 5:55 a.m. but was not actually done and Mr. Moore told him he had to stay until 6:00 a.m. July 1, 2011, was the claimant's last day worked and everything went smoothly as far as Mr. Moore knows but Mr. Moore determined the claimant's job performance was not improving and the employer terminated his employment July 4, 2011. The claimant was not issued any written or documented verbal warnings. The employer usually gives employees a verbal and written warning before termination occurs but can terminate at any time during the employee's first 60 days if it decides the employee is "not a good fit." Mr. Moore concluded the claimant was "just not picking it (the job) up" and continually had to have issues explained to him. The claimant did not meet the employer's expectations during his probationary period although he testified he tried to do his best, stay busy, help other employees and do what he was supposed to do. He did not know his job was in jeopardy because he did not receive any documented verbal or written warnings.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

Iowa Code § 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 employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000). While the claimant's unsatisfactory job performance resulted in his termination during his first 60 days of employment, he never received a documented verbal or a written warning and did not know his job was in jeopardy because of his performance. The claimant credibly testified he did the job to the best of his ability and was not aware the employer felt he was not performing to its standards. The evidence does not establish intentional misconduct on the part of the claimant. Consequently, the administrative law judge must conclude that the claimant's performance does not rise to the level of intentional job misconduct as that term is defined by Iowa law. Therefore, benefits are allowed.

DECISION:

The August 19, 2011, reference 02, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs