

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**LUIS A GONZALEZ NUNEZ**  
Claimant

**APPEAL NO. 14A-UI-01977-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**HY-VEE INC**  
Employer

**OC: 01/26/14**  
**Claimant: Respondent (1)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the February 13, 2014, reference 02, decision that allowed benefits to the claimant provided the claimant was otherwise eligible and that held the employer's account could be charged for benefits. After due notice was issued, a hearing was held on March 13, 2014. Claimant Luis Gonzalez Nunez participated and was represented by Thomas McClinton. Both testified. Paula Mack of Corporate Cost Control represented the employer and presented testimony through Lisa Stowater. Exhibits One, Two, Three and A were received into evidence. The administrative law judge took official notice of information contained on the Iowa Judicial Branch's website concerning Buena Vista County case numbers SRCR042679 and SMSM045454.

**ISSUE:**

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Luis A Gonzalez Nunez was employed by Hy-Vee as a full-time warehouse worker from 2011 until October 30, 2013, when Lisa Stowater, discharged him from the employment. At the time, Ms. Stowater indicated that she was indefinitely suspending Mr. Gonzalez Nunez from the employment. The employer never reinstated Mr. Gonzalez Nunez to the employment.

The employer's decision to separate Mr. Gonzalez Nunez from the employment was based on an incident that occurred on October 27, 2013. The conduct in question occurred while Mr. Gonzalez Nunez was off-duty and away from the workplace. The incident in question resulted in Mr. Gonzalez Nunez being arrested and charged with public intoxication, disorderly conduct, interference with official acts, assault on a peace officer, and simple assault. The assault on a peace officer charge was a serious misdemeanor. The other charges were simple misdemeanors. Mr. Gonzalez Nunez was released on bond the next day. When Mr. Gonzalez Nunez appeared for work on October 30, 2013, the employer would not allow him to work. Instead, Ms. Stowater told Mr. Gonzalez Nunez that he was suspended without pay until further

notice and would only be allowed to return to work if the charges were reduced to a single charge of public intoxication. At the time Ms. Stowater indefinitely suspended Mr. Gonzalez Nunez, he had not yet been formally charged with the serious misdemeanor offence. At the time Ms. Stowater indefinitely suspended Mr. Gonzalez Nunez, he had not been convicted of any of the offenses. The employer obtained booking records from the Buena Vista County Jail, but did not conduct any independent investigation into the criminal charges. Mr. Gonzalez Nunez had missed one day of work in connection with the arrest and incarceration.

The employer asserts that the criminal charges constituted a violation of the employer's written code of conduct. That policy was contained in the employee handbook the employer had provided to Mr. Gonzalez Nunez earlier in his employment. The policy states:

**Code of conduct**

The fundamentals of Hy-Vee are: honesty, integrity, friendliness, caring, sincerity, respect, ethics, morals, dedication, sharing, fairness, manners, dignity and ownership. Keeping these fundamentals in mind helps all employees provide the outstanding service our customers have grown to expect. Linger, horseplay, fighting, disorderly conduct or soliciting are not allowed. Employees may not possess alcohol, drugs, narcotics or weapons on the premises. Falsifying company records, using physical or verbal abuse or profanity, removing company property without authorization, or defacing, destroying or the theft of property is not acceptable conduct.

Purchase of merchandise requires a paid receipt to be with the purchaser or attached to the item prior to use or consumption. Employees are not allowed to check out immediate family members, friends, or themselves.

Violation of any rule, policy or procedure, whether included here, in the store level handbooks or postings, or stated orally by management personnel, will result in disciplinary action up to and including termination. Where criminal laws are violated, termination and prosecution may occur.

All time worked by hourly employees must be on the clock. All time worked by salaried non-exempt employees must be reported.

On November 20, 2013, Mr. Gonzalez Nunez entered a written guilty plea to simple misdemeanor assault, simple misdemeanor disorderly conduct, and simple misdemeanor public intoxication. The serious misdemeanor charge was dismissed pursuant to a plea bargain. Mr. Gonzalez Nunez was sentenced on November 21, 2013. On November 25, 2013, Mr. Gonzalez Nunez spoke with Ms. Stowater regarding the outcome of the criminal prosecution. Ms. Stowater confirmed at that time that Mr. Gonzalez Nunez would not be allowed to return to the employment.

**REASONING AND CONCLUSIONS OF LAW:**

Iowa Administrative Code rule 871 IAC 24.32(9) provides as follows:

Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

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 employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

Violation of a specific work rule, even off-duty, can constitute misconduct. In Kleidosty v. EAB, 482 N.W.2d 416, 418 (Iowa 1992), the employer had a specific rule prohibiting immoral and illegal conduct. The discharge in that case was based on a conviction for selling cocaine off the employer's premises. The Court found misconduct, but stressed the importance of a specific policy, even one which was stated only in terms of illegal or immoral conduct.

This case is immediately distinguishable from Kleidosty. The evidence in the record establishes a discharge that was effective October 30, 2013, when the employer indefinitely suspended Mr. Gonzalez Nunez from the employment. At that time, Mr. Gonzalez had been *charged* with criminal offenses, but had been *convicted* of nothing. Even if the employer's code of conduct policy were deemed to reach the off-duty conduct, the employer terminated the employment prior to any guilty plea or conviction being entered. In other words, the discharge was based on the mere allegation of off-duty misconduct. The administrative law judge concludes that the employer's code of conduct policy did not reach off-duty conduct. The wording of the policy is such that a reasonable person reviewing the policy would conclude that the policy addressed conduct that occurred in the course of the employment and would not take from the policy that it extended to off-duty conduct that had no connection to the employment.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Gonzalez Nunez's discharge was not based on misconduct in connection with the employment and that Mr. Gonzalez Nunez was discharged for no disqualifying reason. Mr. Gonzalez Nunez is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

**DECISION:**

The Claims Deputy's February 13, 2014, reference 02, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

---

James E. Timberland  
Administrative Law Judge

---

Decision Dated and Mailed

jet/pjs