

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NOAH D SCHELLE
Claimant

APPEAL NO. 09A-UI-18440-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 11/08/09
Claimant: Respondent (1)

Section 96.5-2-a – Misconduct

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated December 2, 2009, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on January 19, 2010. Claimant participated. Employer participated by Andy Streit, store director. The employer was represented by Tim Speir. The record consists of the testimony of Andy Streit; the testimony of Noah Schelle; and Employer's Exhibits 1-7.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer owns and operates grocery stores. The store where the claimant was employed as an assistant manager is located in West Des Moines, Iowa. The claimant was hired on June 2, 2008. He was terminated on November 6, 2009.

The incident that led to the claimant's termination occurred on an unknown date. The store director, Andy Streit, was in a restaurant and a customer from the store came up to him and made a complaint about the claimant. Mr. Streit does not know the date the complaint to him was made, but it was within a day or two of the claimant's termination. He made the decision to terminate the claimant based on the fact that there had been other complaints about the claimant.

On September 30, 2009, Mr. Streit and another member of management—Brian—met to discuss the claimant's customer service performance. The claimant was counseled about body language and tone of voice and his lack of urgency to help customers. He was told that the next time he was talked to about proper customer service that he would no longer have a job. There

had been two prior disciplinary notices on March 9, 2009, and April 2, 2009, for poor customer service.

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.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Unsatisfactory performance is not misconduct. In order to justify disqualification, the evidence must establish that the final incident leading to the decision to discharge was a current act of misconduct. See 871 IAC 24.32(8). See also Green v. EAB, 426 N.W.2d 659 (Iowa App. 1988) The employer has the burden of proof to show misconduct.

The claimant was terminated because some customers had complained about his body language, tone of voice, and his seeming indifference to their complaints. Mr. Streit testified that good customer service is a top priority at Hy-Vee. The claimant could be expected to be attentive to customer needs and respond appropriately to any complaints. The difficulty is that good customer service is a somewhat subjective standard. A customer's perception of what the claimant did or said will depend on many factors. If the employer did receive numerous complaints from customers about the claimant and performance is judged on those complaints,

then the claimant's discharge is for unsatisfactory performance. Unsatisfactory performance is not misconduct.

The final incident is particularly difficult to classify as misconduct, given the vague details and the way it was reported to the employer. The employer had the right to make a business decision that the claimant was not providing the type of customer service expected from an assistant manager. There is insufficient evidence, however, to establish misconduct. Benefits are allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated December 2, 2009, reference 01, is affirmed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs