

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RYAN F SPOMER
Claimant

APPEAL NO. 09A-UI-10609-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

**Original Claim: 06/14/09
Claimant: Respondent (2-R)**

Section 96.5(2)a – Discharge for Misconduct
Section 96.3(7) – Recovery of Overpayments

STATEMENT OF THE CASE:

Hy-Vee, Inc. filed an appeal from a representative's decision dated July 15, 2009, reference 01, which held that no disqualification would be imposed regarding Ryan Spomer's separation from employment. After due notice was issued, a hearing was held by telephone on August 11, 2009. Mr. Spomer participated personally. The employer participated by Doug Mezger, Store Operations Manager, and Jessica Monical, Assistant Manager of Perishables. The employer was represented by Tim Speir of Unemployment Insurance Services.

ISSUE:

At issue in this matter is whether Mr. Spomer was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

Having heard the testimony and having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Spomer was employed by Hy-Vee, Inc. from May 8, 2008 until June 12, 2009 as a full-time assistant manager. He was discharged from the employment.

Mr. Spomer was given a written warning on March 30, 2009 after he referred to a coworker as a "fucking cunt." On April 13, he received a written warning regarding his conduct of April 12. He spent almost two hours behind the service desk when he should have been out on the floor making sure things were running smoothly. During the time he was behind the counter, he spent 14 minutes on a personal call and 18 minutes sitting on a stool and using the internet.

The decision to discharge Mr. Spomer was based on a customer complaint received on June 12. The customer believed she was to receive a free carton of milk when she purchased certain cereals. The customer did not feel Mr. Spomer listened to her position, only told her that she was mistaken. She did not get the free milk. He had been trained to give the customer the benefit of the doubt. He was discharged the same day.

Mr. Spomer filed a claim for job insurance benefits effective June 14, 2009. He has received a total of \$1,444.00 in benefits since filing the claim.

REASONING AND CONCLUSIONS OF LAW:

An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). For reasons that follow, the administrative law judge concludes that disqualifying misconduct has been established by the evidence. Mr. Spomer developed a pattern of disregarding the employer's interests and standards. He knew or should have known that it was inappropriate to refer to a coworker as a "fucking cunt." Such conduct could have exposed the employer to claims of sexual harassment or hostile work environment.

Mr. Spomer was spending time on personal matters rather than work on April 14 when he spent an inordinate amount of time behind the service counter. He spent over 30 minutes of work time making a personal call and going on the internet. This is basically theft of time, as he was paid for time not devoted to work-related efforts. The matter that prompted his discharge was relatively minor. He failed to make sure the customer left the store satisfied. The customer left the store without the free milk she was expecting after having purchased the cereals she believed entitled her to the free milk. The employer was more willing to lose the milk than the customer. It was Mr. Spomer's job to try to make sure the store did not lose the customer.

After considering all of the evidence, the administrative law judge concludes that Mr. Spomer's conduct was clearly contrary to what the employer had the right to expect from a member of management. As such, it is concluded that disqualifying misconduct has been established and benefits are denied.

Mr. Spomer has received benefits since filing his claim. As a general rule, an overpayment of job insurance benefits must be repaid. Iowa Code section 96.3(7). If the overpayment results from the reversal of an award of benefits based on an individual's separation from employment, it may be waived under certain circumstances. An overpayment will not be recovered from an individual if the employer did not participate in the fact-finding interview on which the award of benefits was based, provided there was no fraud or willful misrepresentation on the part of the individual. This matter shall be remanded to Claims to determine if benefits already received will have to be repaid.

DECISION:

The representative's decision dated July 15, 2009, reference 01, is hereby reversed. Mr. Spomer was discharged for misconduct in connection with his employment. Benefits are withheld until he has worked in and been paid wages for insured work equal to ten times his weekly job insurance benefit amount, provided he is otherwise eligible. This matter is remanded to Claims to determine the amount of any overpayment and whether Mr. Spomer will be required to repay benefits.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/kjw