

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DANIEL SPRING
Claimant

APPEAL NO: 11A-UI-04576-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 02-27-11
Claimant: Respondent (1)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 31, 2011, reference 01, 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 June 3, 2011. The claimant participated in the hearing with his sister Kathy Ellett, his brother-in-law Dan Ellett, and Travis Anderson, his Easter Seals case worker. Doug Mezger, Manager of Store Operations and current Store Director in Denison; Mike Blunk, Human Resources Manager; and Shaun Lampel, 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 courtesy clerk for Hy-Vee from June 20, 2000 through January 7, 2011. He is mentally challenged and his job involved sacking groceries and bringing in grocery carts from the parking lot. The employer received a customer complaint December 3, 2010, about how the claimant was sacking groceries. He apparently crushed the customer's bread and placed eggs in with other heavy items. The employer conducted an evaluation December 4, 2010, and confirmed the claimant was inappropriately sacking the groceries. The employer counseled the claimant December 13, 2010, for the way he was sacking groceries and for failing to follow the dress code. The claimant was dressing sloppily and he had noticeable body odor, both of which had been previously addressed. The claimant was retrained but the employer continued to get complaints about the claimant's poor grocery sacking. The employer had to replace a customer's bread and eggs because the claimant damaged them when he packed the items inappropriately. Additionally, the front end manager noted the claimant deliberately disobeyed directives January 4, 2011, when he continued to move from register to register. Because the claimant also disregarded the retraining on how to sack groceries, the decision was made to terminate his employment. The employer believed the claimant was capable of performing the job duties satisfactorily but was simply not doing so.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job misconduct.

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). The claimant was discharged January 7, 2011, for poor work performance. Misconduct connotes volition. A failure in job performance which results from inability or incapacity is not volitional and therefore, not misconduct. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979). When an individual is discharged due to a failure in job performance, proof of that individual's ability to do the job is required to justify disqualification, rather than accepting the employer's subjective view. To do so is to impermissibly shift the burden of proof to the claimant. Kelly v. Iowa Department of Job Service, 386 N.W.2d 552 (Iowa App. 1986). The evidence demonstrates the claimant did not meet the employer's expectations but there is no evidence of any wrongful intent. Misconduct must be substantial in nature to support a disqualification from

unemployment benefits. Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1982). The focus is on deliberate, intentional, or culpable acts by the employee. Id. While the claimant was making errors and appeared to disregard the retraining, the fact that the claimant is mentally challenged makes it difficult to know for sure if he did understand exactly what was expected of him. Consequently, the administrative law judge must conclude the employer has not met its burden of proving disqualifying job misconduct as defined by Iowa law. Therefore, benefits are allowed.

DECISION:

The March 31, 2011, reference 01, 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