

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JONATHAN S ROBERTS**  
Claimant

**APPEAL NO: 06A-UI-08433-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**HY-VEE INC**  
Employer

**OC: 07/16/06 R: 01**  
**Claimant: Respondent (2)**

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

**STATEMENT OF THE CASE:**

Hy-Vee filed a timely appeal from the August 18, 2006, reference 03, decision that allowed benefits. After due notice was issued, a hearing was held on September 7, 2006. Claimant Jonathan Roberts did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. David Williams of TALX UC eXpress represented the employer and presented evidence through Store Director Todd Wagner and Assistant Night Stock Manager James Nichols. Employer's Exhibits One through Three were received into evidence.

**ISSUE:**

Whether Mr. Roberts was discharged for misconduct in connection with the employment that disqualifies him for unemployment insurance benefits. He was.

Whether Mr. Roberts has been overpaid unemployment insurance benefits. He has.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Jonathan Roberts was employed by a Hy-Vee store in Council Bluffs as an overnight stock clerk from November 30, 2005 until April 25, 2006, when Store Director Todd Wagner discharged him. Mr. Roberts' immediate supervisor was Assistant Night Stock Manager James Nichols.

The final incident that prompted the discharge occurred during the overnight shift on April 24-25, 2006. Assistant Night Stock Manager James Nichols had directed the night stock crew, including Mr. Roberts, to "double face" the merchandise in preparation for an upcoming inspection. This meant bring two rows of merchandise to the front of the display shelf. Part way through the work, Mr. Nichols confirmed with the staff that each was "double facing" the merchandise and the crew, including Mr. Roberts, indicated they were complying with the directive. Soon thereafter, Mr. Nichols discovered that Mr. Roberts had not, in fact, been "facing" the cans two deep as directed. Mr. Nichols summoned Mr. Roberts to return to the

affected area and assist with correctly “double facing” cans. Mr. Roberts became upset, threw up his hands, and said, “Okay, I’m done.” Mr. Roberts then proceeded to the front door. After a discussion between Mr. Roberts and the manager on duty, Mr. Roberts returned to the work area. At that time, Mr. Roberts proceeded to intentionally drop cans on the floor. Mr. Nichols instructed Mr. Roberts to stop dropping the cans. At that point, Mr. Roberts responded, “Why you gotta be such a dick?” Mr. Nichols explained that the two were redoing work that Mr. Roberts had intentionally failed to perform correctly the first time. Mr. Roberts ceased dropping cans and continued to work. Mr. Nichols documented the incident and reported it to Store Director Todd Wagner the next morning.

The final incident that prompted the discharge followed other incidents in which Mr. Roberts’ conduct had prompted the employer to intervene and/or issue a reprimand. On April 8, Ms. Nichols observed Mr. Roberts throwing boxes of merchandise, which were then splitting open and breaking. Mr. Nichols instructed Mr. Roberts to stop. Mr. Roberts stopped for a short while. Soon thereafter, Mr. Nichols again observed Mr. Roberts throwing boxes. Prior to the final incident, the employer had warned Mr. Roberts that his conduct could lead to discharge from the employment.

At the time Store Director Todd Wagner met with Mr. Roberts for the purpose of discharging him, Mr. Wagner first asked Mr. Roberts whether he thought he had an anger management problem and offered assistance in obtaining anger management treatment. Mr. Roberts declined the offer of assistance and Mr. Wagner proceeded with the discharge.

Mr. Roberts established a claim for benefits that was effective July 16, 2006 and has received benefits.

## **REASONING AND CONCLUSIONS OF LAW:**

The question is whether the evidence in the record establishes that Mr. Roberts was discharged for misconduct in connection with the employment. It does.

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).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8).

An employer has the right to expect decency and civility from its employees and an employee's use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct disqualifying the employee from receipt of unemployment insurance benefits. Henecke v. Iowa Department of Job Service, 533 N.W.2d 573 (Iowa App. 1995). Use of foul language can alone be a sufficient ground for a misconduct disqualification for unemployment benefits. Warrell v. Iowa Dept. of Job Service, 356 N.W.2d 587 (Iowa Ct. App. 1984). An isolated incident of vulgarity can constitute misconduct and warrant disqualification from unemployment benefits, if it serves to undermine a superior's authority. Deever v. Hawkeye Window Cleaning, Inc. 447 N.W.2d 418 (Iowa Ct. App. 1989).

Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985).

The evidence in the record establishes that during the overnight shift on April 24-25, Mr. Roberts directed a vulgar comment at his immediate supervisor that served to undermine the supervisor's authority. This constituted substantial misconduct in connection with the employment. In addition, the evidence establishes that Mr. Roberts engaged in a pattern of unreasonably disregarding the employer's reasonable instructions. The purpose of the request that Mr. Roberts "double face" the merchandise was to make the store presentable to customers and acceptable to reviewing members of management in connection with a contest. The purpose of the request that Mr. Roberts not intentionally drop cans or cause damage to merchandise by throwing it was to prevent unnecessary loss to the employer.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Roberts was discharged for misconduct. Accordingly, Mr. Roberts

is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Roberts.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

Because Mr. Roberts received benefits for which he has been deemed ineligible, those benefits constitute an overpayment that Mr. Roberts must repay to Iowa Workforce Development. Mr. Roberts is overpaid \$875.00.

**DECISION:**

The Agency representatives August 18, 2006, reference 03, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account will not be charged. The claimant is overpaid \$875.00.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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