

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KEVIN W HAUGEN
Claimant

APPEAL NO: 09A-UI-03506-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 02/08/09

Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Hy-Vee, Inc. (employer)) appealed a representative's February 27, 2009 decision (reference 01) that concluded Kevin W. Haugen (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 7, 2009. The claimant participated in the hearing. Tim Speir of Unemployment Insurance Services appeared on the employer's behalf and presented testimony from two witnesses, Matt Off and Tom Potter. During the hearing, Employer's Exhibit One was entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on July 12, 2006. He worked full time as a night stocker in the employer's Marion, Iowa store. His last day of work was January 25, 2009. The employer discharged him on January 27, 2009. The reason asserted for the discharge was violations of the employer's break policy.

The claimant had a history of failing to punch out to take smoke breaks. For this, he had received warnings on June 3 and October 28, 2008, and January 20, 2009. The employer's break policy requires employees to punch out and punch in each time they leave the building, even though if they stayed in the building for their break they would not need to punch out and in. The claimant had expressed his opinion that this was unfair as applied to smokers who could not stay in the building to smoke. The final warning on January 20 specified that "if this situation arises again further action will be taken," and failure to comply with the plan of action, which was "must punch out if leaving the building," could result in termination.

On the night of January 24 into January 25, at approximately 12:57 a.m., Mr. Potter, the night stock manager, announced a break, which would be 30 minutes. A few minutes later he looked

for the claimant but did not see him in the normal designated break areas. Another employee suggested that he look in the shelving deck. Mr. Potter went to that area, where he saw the claimant crouching down, which he interpreted as an attempt to hide. The claimant asserted that he was looking for a piece of shelving to replace a broken coffee shelf in the store. The shelving area is not a designated break area. There was no evidence the claimant had made any attempt to smoke in the shelving area.

Because the claimant was in an area other than a designated break area of the store after the prior warnings for not clocking out when leaving the store while taking a break, the employer initially sent the claimant home for the rest of the shift and then discharged him.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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. 871 IAC 24.32(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is his being in an undesignated break area after having other problems with him not clocking out when leaving the store building for breaks. Misconduct connotes volition. Huntoon, supra. The prior warnings were focused on clocking out when leaving the building for a break; there was nothing in the warnings to indicate that any further violation of the break policy of any kind would result in discharge. There is no evidence the claimant intentionally went to the shelving deck during the break time knowing that doing so could be placing his job in jeopardy, even if his explanation of looking for a replacement shelf is not accepted. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's February 27, 2009 decision (reference 01) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs