

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SHERRY R WELLS
Claimant

APPEAL NO. 07A-UI-10116-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 09/23/07 R: 04
Claimant: Respondent (1)

Section 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

Hy-Vee, Inc. filed an appeal from a representative's decision dated October 29, 2007, reference 01, which held that no disqualification would be imposed regarding Sherry Wells' separation from employment. After due notice was issued, a hearing was held by telephone on November 19, 2007. Ms. Wells participated personally and was represented by William Cahill, Attorney at Law. The employer participated by Bill Stevens, Assistant Director, and Doug Dop, Store Manager. The employer was represented by David Williams of Talx Corporation.

ISSUE:

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

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all of the evidence in the record, the administrative law judge finds: Ms. Wells was employed by Hy-Vee from August 18, 1970 until September 6, 2007. She worked as a checker during the last ten years of her employment. The decision to discharge was prompted by a customer complaint received on September 6, 2007.

After leaving the store on September 6, a customer called and spoke to the store manager. She indicated that she had gone through Ms. Wells' checkout line. She indicated that Ms. Wells had yelled "wait" to the customer behind her as that individual was placing items on the conveyor. The customer was of the opinion that Ms. Wells said "wait" so that the two orders would not become commingled. Ms. Wells could not reach the block that is usually placed between orders to keep them separated. The customer also told the manager that, when she asked Ms. Wells what her total was, Ms. Wells pointed at the scanner screen and pointed out the total rather than verbalizing it to the customer. The complaint violated the terms of the final warning she received on July 2, 2007. As a result, Ms. Wells was discharged on September 6.

The warning Ms. Wells received on July 2 was due to a statement made by a customer. The employer was attempting to direct the customer to Ms. Wells' line so that he would have a

shorter wait. The customer indicated he did not want to go through her line because of an incident that had occurred in the past. The customer had paid for items and then decided he wanted to use exact change rather than receive change back from a \$10.00 bill. Ms. Wells would not allow him to do so because she had already closed her drawer after his transaction.

Ms. Wells had been disciplined for requesting identification from individuals making alcohol purchases even though the individuals were of legal age. It is the employer's policy to request identification from any individual who appears to be under age 27. A checker is to use his or her own discretion in determining whether identification is required. When questioned as to why she was requesting identification on older individuals, Ms. Wells responded that she felt she was only doing her job. She had also received a warning when she returned a check to a customer for completion. The customer had made the check payable to "H.V." Instead of writing out "Hy-Vee" herself, Ms. Wells gave the check back to the customer and had him write it out. She did not know she had the authority to write on the customer's check as she felt it might be forgery.

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). Before a disqualification may be imposed, the evidence must establish that the discharge was predicated on a current act that constituted misconduct within the meaning of the law. See 871 IAC 24.32(8). In the case at hand, the decision to discharge Ms. Wells was triggered by the customer complaint of September 6. The evidence failed to establish that Ms. Wells yelled to the customer when she requested that she wait. Her request that the customer wait was reasonable given that she did not want two orders to be commingled. Although Ms. Wells only pointed to the screen when the customer asked what her total was, her actions did not evince a willful or wanton disregard of the employer's standards. The administrative law judge concludes that Ms. Wells did not engage in misconduct, as that term is defined by law, on September 6, 2007.

The next most prior disciplinary action prior to the discharge was on July 2, 2007. The administrative law judge need not determine if the conduct represented misconduct. Conduct that came to the employer's attention on July 2 would not be a current act in relation to the discharge that occurred on September 6, 2007. Because there was not a current act of misconduct, the administrative law judge is not free to consider other, past acts that might constitute misconduct.

It was well within the employer's prerogative to discharge Ms. Wells. However, absent a current act of misconduct, no disqualification is imposed. Accordingly, benefits are allowed.

DECISION:

The representative's decision dated October 29, 2007, reference 01, is hereby affirmed. Ms. Wells was discharged but misconduct has not been established. Benefits are allowed, provided she satisfies all other conditions of eligibility.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/pjs