

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**PEG E CHITWOOD**  
Claimant

**APPEAL NO. 11O-UI-10009-AT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**HY-VEE INC**  
Employer

**OC: 02/27/11**  
**Claimant: Respondent (2R)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

Hy-Vee, Inc. filed a timely appeal from an unemployment insurance decision dated April 11, 2011, reference 01, that allowed benefits to Peg E. Chitwood. Notice was issued for a telephone hearing to be held May 16, 2011. The employer did not respond to the notice. Administrative law judge decision 11A-UI-05213-CT affirmed the allowance of benefits. The employer filed an appeal to the Employment Appeal Board. The Board remanded the case for further proceedings upon a finding that the employer had not received notice of the May 16 hearing. After due notice was issued, a telephone hearing was held January 30, 2012 with Ms. Chitwood participating. Paula Mack of Corporate Cost Control represented the employer. Manager Jeff Auckes and Clubroom Manager Lacey Rumsey testified. Employer Exhibit One was admitted into evidence. The administrative law judge takes official notice of agency benefit payment records.

**ISSUE:**

Was the claimant discharged for misconduct in connection with the employment?

**FINDINGS OF FACT:**

Peg E. Chitwood was employed by Hy-Vee, Inc. from June 17, 2004 until she was discharged February 25, 2011. She last worked as a grocery department checker. She was discharged because of poor attendance. She was tardy on ten occasions during the month of February 2011. The final occurrence was on February 24, 2011. In addition, she was absent for her shift on February 23, 2011 without contacting management. Company policy requires that an individual speak to a member of management to report an impending absence. Ms. Chitwood had received several verbal warnings about her attendance. She had most recently received a written warning in December 2010. Ms. Chitwood's tardiness problem was of long duration.

Ms. Chitwood has received unemployment insurance benefits since filing a claim effective February 27, 2011.

## REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence establishes that the claimant 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.

Excessive unexcused absenteeism, a concept that includes tardiness, is one form of misconduct. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). Absence due to matters beyond an individual's control, such as illness, are considered to be excused if the individual properly reports the absence to the employer. See Higgins and 871 IAC 24.32(7).

The evidence in the record establishes 11 attendance occurrences in 24 days. Ten of the occurrences were tardiness for personal reasons. The other occurrence was a full day absence that was not reported to management in advance. This evidence is sufficient to establish misconduct. Benefits are withheld.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a

continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

The question of whether the claimant must repay the benefits she has received is remanded to the Unemployment Insurance Services Division.

**DECISION:**

The unemployment insurance decision dated April 11, 2011, reference 01, is reversed. Benefits are withheld until the claimant has worked in and has been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The question of repayment of benefits is remanded.

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Dan Anderson  
Administrative Law Judge

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Decision Dated and Mailed

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