

IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI

JESSICA R ARMENT  
1002 ADVENTURELAND APT 121  
ALTOONA IA 50009-2268

HY-VEE INC  
c/o TALX UCM SERVICES INC  
PO BOX 283  
SAINT LOUIS MO 63166

TALX UC EXPRESS  
3799 VILLAGE RUN DR #511  
DES MOINES IA 50317

**AMENDED**  
Appeal Number: 06A-UI-02303-S2T  
OC: 01/15/06 R: 02  
Claimant: Appellant (3)

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4<sup>th</sup> Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Jessica Arment (claimant) appealed a representative's February 16, 2006 decision (reference 02) that concluded she was not eligible to receive unemployment insurance benefits because she had voluntarily quit employment with Hy-Vee (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 22, 2006. The claimant participated personally. The employer represented by David Williams, Manager of Operations, participated by Joe Miller, Assistant Store Director, and Amela Okic, Salad Bar Manager. Karee White observed the hearing.

#### FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on August 22, 2005, as a part-time salad bar clerk. The claimant signed for receipt of the company handbook on August 22, 2005. On September 1, 2 and 3, 2005, the claimant was absent due to a cold. On September 5, 2005 employer issued a warning to the claimant for attendance. The employer told the claimant that she had to provide a doctor's excuse for future absences due to illness.

The claimant was absent due to illness on September 23, 24 and 25, 2005. She telephoned the employer and asked for her manager but the manager was unavailable. The claimant did not tell anyone she was ill and would not be at work. The claimant left messages at the manager's residence but there were no messages on the answering machine. The claimant did not know what number she dialed. At some point the claimant went to a physician and the physician gave the claimant an excuse for September 23, 24 and 25, 2005. The claimant did not give the excuse to the employer.

The employer did not receive any messages from the claimant after she last worked on September 22, 2005. On or about September 26, 2005, the claimant telephoned the manager and asked when she was next scheduled. The employer told the claimant she was terminated for attendance.

The testimony of the employer and claimant was inconsistent. The administrative law judge finds the employer's testimony to be more credible because the claimant was unclear on dates, numbers and other information. In addition she was unwilling to obtain documentation which could provide information necessary to assist her case.

#### REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant voluntarily quit without good cause attributable to the employer. For the following reasons the administrative law judge concludes she did.

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, (8) provide:

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

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

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incident of absenteeism was an improperly reported illness which occurred on September 23, 24 and 25, 2005. The claimant's absences do amount to job misconduct because they were not properly reported. The claimant was discharged for misconduct. She is not eligible to receive unemployment insurance benefits.

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.

The claimant has received benefits in the amount of \$645.00 since filing her claim herein. Pursuant to this decision, those benefits now constitute an overpayment which must be repaid.

DECISION:

The representative's February 16, 2006 decision (reference 02) is modified in favor of the respondent. The claimant is not eligible to receive unemployment insurance benefits because she was discharged from work for misconduct. Benefits are withheld until she 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 claimant is overpaid benefits in the amount of \$645.00.

bas/tjc