

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

JESSE D YIRKOVSKY
1012 - 6TH AVE N
DENISON IA 51442-1063

HY-VEE FOOD STORES INC
C/O TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 06A-UI-02080-JTT
OC: 01/22/06 R: 01
Claimant: Appellant (1)

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, 4th 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.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5(2)(a) - Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant Jesse Yirkovsky filed a timely appeal from the February 10, 2006, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on March 9, 2006. Claimant participated. David Williams of Talx UC Express represented Hy-Vee and presented testimony through Store Director Colin Venenga and Market Manager Patty Speak.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Jesse Yirkovsky was employed by Hy-Vee as a full-time meat cutter from January 16, 1999 until January 25, 2006, when Store Director Colin Venenga discharged him.

The final incident that prompted the discharge occurred on January 25, 2006, when Mr. Venenga discovered Mr. Yirkovsky cooking store-owned food for his own consumption. Mr. Yirkovsky had not paid for the food. On January 25, Mr. Venenga had passed the meat department, smelled something cooking, gone into the meat department and discovered chicken breasts cooking in a convection oven. Mr. Yirkovsky was working in the meat department at the time. Mr. Venenga returned a short time later and observed that one of the chicken breasts had been consumed. On January 2, 2006, Market Manager Patty Speak had reprimanded Mr. Yirkovsky for cooking store-owned food for his own consumption and warned Mr. Yirkovsky that another similar incident would result in his discharge. This warning followed multiple instances of similar behavior. When Mr. Venenga summoned Mr. Yirkovsky to the office on January 25, Mr. Yirkovsky told Mr. Venenga that he had cooked the meat because the meat was too old to be sold to a customer and the meat department was going to throw the meat away.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Yirkovsky 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.

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).

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).

Mr. Yirkovsky asserted at the hearing that his purpose in cooking the food on January 25 was to prepare free samples for customers. However, when Mr. Venenga questioned Mr. Yirkovsky on January 25 prior to the discharge, Mr. Yirkovsky made no mention of preparing free samples for customers. Mr. Yirkovsky asserted at the hearing that it was a coworker, not Mr. Yirkovsky, who consumed the chicken breast on January 25. However, when Mr. Venenga questioned Mr. Yirkovsky on January 25, Mr. Yirkovsky made no mention of another employee being involved in preparation or consumption of the food item. The administrative law judge finds Mr. Yirkovsky's belated assertions not credible.

The evidence in the record establishes that Mr. Yirkovsky was discovered cooking food for his own consumption without paying for it after Mr. Yirkovsky had recently been warned that such conduct would result in his discharge from the employment. Mr. Yirkovsky's behavior constituted theft. Mr. Yirkovsky was on warning that the employer considered the conduct theft, but engaged in the conduct nonetheless. Mr. Yirkovsky's behavior constituted willful and wanton disregard of the interests of the employer.

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

DECISION:

The Agency representative's decision dated February 10, 2006, reference 01, is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and 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.

jt/tjc