

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

PAMELA K AHRENS
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DAVENPORT IA 52802

HY-VEE INC
c/o TALX UCM SERVICES INC
PO BOX 283
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TALX UC EXPRESS
3799 VILLAGE RUN DR STE 511
DES MOINES IA 50317

Appeal Number: 05A-UI-01359-JTT
OC: 01/09/05 R: 04
Claimant: Respondent (2)

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 96.3-7 – Recovery of Overpayment of Benefits
Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Hy-Vee filed a timely appeal from the February 1, 2005, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on February 23, 2005. Pamela Ahrens participated in the hearing. David Williams of Talx UC Express represented Hy-Vee and presented testimony through Scott James, Store Director, and Jarrod Gugelmeyer, Assistant Manager.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Pamela Ahrens was employed by Hy-Vee on a full-time basis from March 2, 1989 until January 7, 2005,

when Mr. James discharged her for misconduct. Ms. Ahrens was promoted to Video Manager in October 2003 and continued in that position until the time of discharge.

The last incident that prompted Mr. James to discharge Ms. Ahrens occurred on December 30, 2004. On that day, Ms. Ahrens was engaged in the process of marking previously-viewed videotapes (videos) and digital video disks (DVDs) for retail sale and placing them on a shelf for customers to purchase. The retail price for the videos was \$5.99. The retail price for the DVDs was \$9.99. Ms. Ahrens held back three DVDs for herself. Ms. Ahrens set the videos aside without a price sticker attached. At the end of her shift, Ms. Ahrens collected the DVDs she had set aside and applied to each of the DVDs the \$5.99 price sticker that only applied to VHS tapes. Ms. Ahrens then proceeded through the checkout lane of a recently hired cashier. Prior to checking out, Ms. Ahrens placed the DVDs on the checkout counter and stepped away for a moment. In the meantime, Assistant Manager Jarrad Gugelmeyer had become curious about the titles Ms. Ahrens had selected to purchase, looked at the DVDs and noticed that the wrong, less expensive price tag was attached. Ms. Ahrens proceeded to make her purchase, which included the three DVDs and four goblets priced at 75 cents a piece. The total amount of the purchase was approximately \$22.00.

Mr. Gugelmeyer reported the incident to Mr. James. The following Monday or Tuesday, Mr. James spoke to Ms. Ahrens about the incident. Ms. Ahrens indicated it had just been a mistake, that she had accidentally grabbed the wrong price stickers, and that she had not noticed that her total bill for the transaction was significantly less than what the three DVDs would normally cost.

Ms. Ahrens was a member of management and regularly participated in management meetings. A frequent topic of discussion at those meetings was the policy against employees, including managers, marking merchandise for their own purchase. This policy was strictly enforced so that the employer would not be placed in the position of having to decide whether an employee had committed an honest mistake or committed theft. Ms. Ahrens was well aware of this policy.

Ms. Ahrens established a claim for benefits that was effective January 9, 2005, and has received benefits totaling \$1,385.00 since that time.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Ahrens was discharged for misconduct in connection with her employment.

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).

Because the claimant was discharged, the employer bears 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).

Ms. Ahrens testified at the hearing that she had been in a hurry and did not notice that she had placed the wrong, less expensive price tag on the DVDs she had selected for her own purchase. Ms. Ahrens was the manager of the video department and had held that position for over two years. Ms. Ahrens routinely marked previously-viewed videos and DVDs for customers to purchase. Keeping track of inventory, sales and the overall operation of the video department were the essence of Ms. Ahrens' position as video manager. Ms. Ahrens knowingly violated the employer's policy by pricing merchandise she intended to purchase. Having listened carefully to, and carefully weighed, Ms. Ahrens testimony about the several "mistakes" she made on December 30, the administrative law judge does not find that testimony to be plausible or credible. The weight of the evidence indicates that Ms. Ahrens intentionally placed the wrong, less expensive price tag on the DVDs and then intentionally proceeded through the checkout lane of an inexperienced cashier who would not notice that the DVDs were incorrectly priced. The weight of the evidence indicates that Ms. Ahrens was well aware that she had purchased the three DVDs for significantly less than they should have cost.

Based on a careful review of the evidence and application of the appropriate law, the administrative law judge concludes that Ms. Ahrens was discharged for misconduct. Accordingly, Ms. Ahrens is disqualified for 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.

Having concluded that Ms. Ahrens is disqualified for benefits, the benefits she has previously received constitute an overpayment. Ms. Ahrens has been overpaid benefits in the total amount of \$1,385.00. Ms. Ahrens will have to repay that amount.

DECISION:

The representative's decision dated February 1, 2005, reference 01, is reversed. The claimant was discharged from her employment for misconduct. The claimant is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit allowance.

jt/kjf