

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LAURA GONZALEZ

Claimant

APPEAL NO: 11A-UI-07889-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC

Employer

OC: 05/15/11

Claimant: Respondent (2-R)

Section 96.5-2-a – Discharge

Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

Hy-Vee, Inc. (employer) appealed a representative's June 8, 2011 decision (reference 01) that concluded Laura Gonzalez (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on July 11, 2011. The claimant participated in the hearing. Alyce Rose Thatch of Corporate Cost Control appeared on the employer's behalf and presented testimony from three witnesses, Tony Taylor, Cindy Vashon, and Cody Kinzer. During the hearing, Employer's Exhibits One through Eight were entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on October 17, 2008. She worked full time as an assistant manager at the employer's Council Bluffs, Iowa store. Her last day of work was May 16, 2011. The employer discharged her on that date. The stated reason for the discharge was unacceptable work performance after prior warning.

The claimant had been given several prior warnings on various performance issues, and on March 24, 2011 was given a final warning regarding the proper performance of all her duties. On May 9 the claimant came on duty at 4:00 p.m. and was responsible for the front end of the store. Shortly after 4:00 p.m. Ms. Vashon, the store's human resources manager, came to the front of the store and saw there were several lines where there were three customers deep. The employer's policies are not to allow the customer lines to get to three deep. The claimant had not called for backup, so Ms. Vashon got on a register herself and paged other managers to come to the front lines to assist; two other managers had gotten onto the registers and had reduced the lines by the time Mr. Taylor, the assistant store director, got to the front about five minutes later. Shortly thereafter, Ms. Vashon checked the parking lot and found that the carts

were backed up so as to extend into the driving lanes, so she sent someone out to retrieve the carts; these were duties for which the claimant had been responsible.

Mr. Taylor had intended to discuss the incident with the claimant on or about May 12, but in the interim learned from another manager that later on the May 9 shift, shortly after 12:00 a.m. but while the claimant was still on duty, the claimant had spent about eleven minutes on the computer in the office looking at wedding sites on the internet. He determined to wait until video surveillance could be retrieved to discuss that issue with the claimant as well. In the further interval, the employer learned that on May 14 the claimant had picked up some inventory for stocking from Mr. Kinzer, another assistant manager, at about 10:30 p.m., and then had been unavailable until about 11:30 p.m.; during the hour he had paged her about four times. When he asked her at 11:30 p.m. where she had been, she told him "not to worry about it."

As a result of these three incidents after the final warning on March 23, the employer determined to discharge the claimant on May 16.

The claimant established a claim for unemployment insurance benefits effective May 15, 2011. The claimant has received unemployment insurance benefits after the separation.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982); Iowa Code § 96.5-2-a.

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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. 871 IAC 24.32(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The claimant's inattention to her duties after being given the final warning shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. While the evidence is least clear on the incident on May 14, even the claimant's admitted use of the internet while on duty alone after the prior warnings regarding her attention to work while on duty would be sufficient to establish an intentional disregard. The employer discharged the claimant for reasons amounting to work-connected misconduct.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code § 96.3-7. In this case, the claimant has received benefits but was ineligible for those benefits. The matter of determining the amount of the overpayment and whether the claimant is eligible for a waiver of overpayment under Iowa Code § 96.3-7-b is remanded the Claims Section.

DECISION:

The representative's June 8, 2011 decision (reference 01) is reversed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of May 16, 2011. This disqualification continues until the claimant has been paid ten times her weekly benefit amount for insured work, provided she is otherwise eligible. The employer's account will not be charged. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs