

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

VINCENT MCGEE
Claimant

APPEAL NO. 12A-UI-01058-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 12/04/11
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Hy-Vee (employer) appealed a representative's January 20, 2012 decision (reference 01) that concluded Vincent McGee (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for February 22, 2012. The claimant participated personally. The employer was represented by Sabrina Bentler, Employer's Representative, and participated by Allison Dunker, Manager of Perishables.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

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 December 27, 2010, as a part-time night stocker. The claimant signed for receipt of the employer's handbook. On December 28, 2010, immediately after he was hired, the employer issued the claimant a written warning for inappropriate behavior. The employer notified the claimant that further infractions could result in termination from employment.

The claimant came down with the flu on or about November 28, 2011. He properly reported his absences through December 4, 2011. The claimant was absent again on December 7, 2011. He properly reported his absence to an assistant manager but the assistant manager did not mention the call to the employer. On December 8, 2011, the claimant talked to an assistant manager about his schedule. The assistant manager told the claimant that he would probably need to provide a doctor's note for his absences. On December 9 and 10, 2011, the claimant was still too weak to work and notified an assistant manager that he could not work. The assistant manager did not notify the employer of the calls. During the December 10, 2011, the assistant manager told the claimant to come in on December 12, 2011, and speak with "Josh".

On December 12, 2011, the claimant went into the workplace and was told to speak to the Manager of Perishables. She told the claimant that he needed to provide a doctor's note or a

receipt for medicine in order to keep his job. The claimant could not afford a doctor's visit and was well on December 12, 2011. Over the counter medicine was purchased by the claimant's roommate and the receipt had been thrown away a week prior. The employer terminated the claimant for failure to provide a doctor's note or receipt for medicine.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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.

871 IAC 24.32(8) provides:

(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). It is important to note that the employer did not terminate

the claimant for absenteeism or failure to report absences. The employer specifically told the claimant that he could keep his job if he provided a doctor's note or receipt. The employer terminated the claimant for failure to provide the documentation, not for absenteeism or failure to report absences.

Repeated failure to follow an employer's instructions in the performance of duties is misconduct. Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employer has a right to expect employees to follow instructions in the performance of the job. In this case the employer's instructions were for the claimant to provide something he did not possess. The question of whether the refusal to perform a specific task constitutes misconduct must be determined by evaluating both the reasonableness of the employer's request in light of all circumstances and the employee's reason for noncompliance. Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa App. 1985).

While it is reasonable for an employer to want an employee to prove that he is sick, it is unreasonable to ask someone without transportation and means to provide something that the employee cannot afford. In addition, it is unreasonable to ask an employee to act after the event is over. In this case the employer asked the claimant for the doctor's note after he was well. The receipt could not be provided because it was gone by the time the employer requested it. The employer did not provide any information indicating that the handbook states a doctor's note or receipt is required if an employee is sick. The claimant failed to follow the employer's instruction because the instruction was unreasonable in this context. The employer did not provide sufficient evidence of job-related misconduct. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's January 20, 2012 decision (reference 01) is affirmed. The employer has not met its proof to establish job-related misconduct. Benefits are allowed.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/css