

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**BARBARA K PELSHAW**  
Claimant

**APPEAL NO. 08A-UI-03123-A**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**HY-VEE INC**  
Employer

**OC: 03/09/08 R: 02**  
**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge  
871 IAC 24.32(8) – Current Act of Misconduct

**STATEMENT OF THE CASE:**

Barbara K. Pelshaw filed a timely appeal from an unemployment insurance decision dated March 28, 2008, reference 01, that disqualified her for benefits. After due notice was issued, a hearing was held in Des Moines, Iowa on April 22, 2008 with Ms. Pelshaw participating and being represented by Laura Jontz, Attorney at Law. Amelia Belmer testified for the claimant. Bakery Manager Steve Wadstrom, Store Operations Manager Tally Rousselow and Store Director Ryan Roberts testified for the employer, Hy-Vee, Inc. which was represented by Tim Spiers of Unemployment Insurance Services. Employer's Exhibit One and Claimant's Exhibits A, B and C were admitted into evidence.

**ISSUE:**

Was the claimant discharged for a current act of misconduct?

**FINDINGS OF FACT:**

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: Barbara K. Pelshaw was employed by Hy-Vee, Inc. from June 12, 1995 until she was discharged on March 8, 2008. She last worked as a cake decorator.

The final incident that led to Ms. Pelshaw's discharge occurred on March 1, 2008. Her direct supervisor, Bakery Manager Steve Wadstrom, observed the incident. Immediately thereafter he reported the incident to Store Operations Manager Tally Rousselow. While Mr. Wadstrom told Ms. Pelshaw that he had just observed the worst customer service ever, he did not say anything to indicate that her job was in jeopardy. He did not send Ms. Pelshaw home, but he allowed her to leave early if she so desired. Ms. Pelshaw worked without incident on March 2, 3 and 4. During this time she performed her normal duties which included interacting with customers. Ms. Pelshaw then had her normal three days off. When she returned to work on March 8, 2008, she was discharged by Store Director Ryan Roberts.

## REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence establishes that the claimant was discharged for a current act of misconduct. It does not.

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.

The employer has the burden of proof. See Iowa Code section 96.6-2. Among the elements it must establish is that the final incident leading directly to the decision to discharge was a current act of misconduct. See 871 IAC 24.32(8).

The evidence establishes that Mr. Wadstrom observed the claimant's demeanor during the final incident and that he immediately notified Ms. Rousselow, the second in command at the facility. The evidence persuades the administrative law judge that no one advised Ms. Pelshaw that her job was in jeopardy until the moment of discharge one week later. During the intervening days, Ms. Pelshaw worked her regular hours and performed her regular duties. The administrative law judge concludes from this that the discharge was not due to a current act. No disqualification may be imposed.

**DECISION:**

The unemployment insurance decision dated March 28, 2008, reference 01, is reversed. The claimant is entitled to receive unemployment insurance benefits, provided she is otherwise eligible.

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Dan Anderson  
Administrative Law Judge

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Decision Dated and Mailed

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