

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JAMES D JENKINS
Claimant

APPEAL NO. 09A-UI-04962-AT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 03/01/09
Claimant: Respondent (1)

Section 96.5-2 –a - Discharge

STATEMENT OF THE CASE:

Hy-Vee, Inc. filed a timely appeal from an unemployment insurance decision dated March 19, 2009, reference 01, that allowed benefits to James D. Jenkins. After due notice was issued, a telephone hearing was held May 22, 2009 with Mr. Jenkins participating. Peter Clark, Jamie Frank and Kevin Lyons testified for the employer which was represented by Barbara Frazier-Lehl. Exhibits One through Seven were admitted into evidence.

ISSUE:

Was the claimant discharged for misconduct in connection with his employment?

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: James D. Jenkins was employed by Hy-Vee, Inc. from December 27, 2007 until he was discharged February 26, 2009. He last worked as a courtesy clerk.

Hy-Vee, Inc. utilizes secret shoppers who report anonymously of their experiences in the company's stores. Approximately 18 such shoppers visit the store at which Mr. Jenkins was employed each year. Store management has no idea of the identity of the shoppers.

The final incident leading to Mr. Jenkins' discharge was an unflattering report by one such shopper that rated Mr. Jenkins' performance while he was bagging groceries.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence establishes that the claimant was discharged for misconduct in connection with his employment. 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 prove is that the final incident leading directly to the decision to discharge was a current act of misconduct. See 871 IAC 24.32(8). While the rules of evidence in contested case proceedings are much more inclusive than the rules of evidence in civil trials in this state, the evidence must contain more than mere allegations of misconduct. See 871 IAC 24.32(4).

The only evidence concerning the final incident is an unsworn anonymously written statement. Neither the claimant nor the employer participants were able to identify the particular customer or the claimant's specific behavior. The administrative law judge finds this evidence to be insufficient to establish misconduct on the claimant's part. No disqualification may be imposed.

DECISION:

The unemployment insurance decision dated March 19, 2009, reference 01, is affirmed. The claimant is entitled to receive unemployment insurance benefits, provided he is otherwise eligible.

Dan Anderson
Administrative Law Judge

Decision Dated and Mailed

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