

**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**

**KELLY S HOPSON  
2720 OAKBERRY AVE  
NEW LONDON IA 52645**

**HY-VEE INC  
c/o TALX UCM SERVICES INC  
PO BOX 283  
SAINT LOUIS MO 63166-0283**

**TALX UC EXPRESS  
3799 VILLAGE RUN DR #511  
DES MOINES IA 50317**

**Appeal Number: 05A-UI-06099-S2T  
OC: 05/15/05 R: 04  
Claimant: Respondent (1)**

**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, 4<sup>th</sup> 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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Hy-Vee (employer) appealed a representative's June 1, 2005 decision (reference 01) that concluded Kelly Hopson (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 held on June 28, 2005. The claimant participated personally. The employer was represented by David Williams, Manager of Operations, and participated by Dave Blum, Manager of Store Operations; Tyler Klossing, Assistant Manager; and Dick Ross, Night Stock Manager. Sarah Lloyd observed the hearing.

#### 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 August 11, 2003, as a full-time night stock clerk. The claimant received a copy of the employer's handbook and signed for its receipt on August 11, 2003. The employer prepared a warning for the claimant on January 2, 2005, regarding unbecoming conduct, but the warning was not given to the claimant. The claimant was absent for five shifts because her husband had a heart attack in May 2005. The employer approved the claimant's absences.

On the evening of May 12, 2005, the claimant was not feeling well. She was experiencing diarrhea, nausea, blurred vision, headache and fatigue. At approximately 11:15 p.m., she was upset regarding seniority issues and discussed them with the Night Stock Manager. The claimant told the Night Stock Manager she was ill and would be leaving. The Night Stock Manager did not hear the claimant and did not respond to her. The claimant left work and telephoned the Assistant Manager when she arrived at home. She explained she was ill and left work. The employer thought the claimant walked off the job because she was upset regarding seniority issues. The employer terminated the claimant on May 13, 2005. On May 17, 2005, the claimant was diagnosed with a thyroid condition that caused her symptoms.

#### REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant was discharged for misconduct. For the following reasons the administrative law judge concludes she was 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.

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).

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). The employer must establish not only misconduct, but that there was a final incident of misconduct which precipitated the discharge. The last incident of absence was a properly reported illness that occurred on May 13, 2005. The claimant's absence does not amount to job misconduct because it was properly reported. The employer has failed to provide any evidence of willful and deliberate misconduct that would be a final incident leading to the discharge. The claimant was discharged, but there was no misconduct.

DECISION:

The representative's June 1, 2005 decision (reference 01) is affirmed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

bas/kjw