

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**BARBRA A RAY**  
Claimant

**APPEAL NO. 07A-UI-09142-S2T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**HY-VEE INC**  
Employer

**OC: 08/26/07 R: 01**  
**Claimant: Respondent (2)**

Section 96.5-2-a – Discharge for Misconduct  
Section 96.3-7 – Overpayment

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the September 21, 2007, reference 01, decision that denied benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on October 15, 2007. The claimant participated personally. The employer was represented by David Williams, Assistant Manager of Appellate Services, and participated by Rick Fyock, Store Director; Randy Thelen, Bakery Manager; Doug Carlson, Manager of Store Operations; and Steve Loomis, Manager of Perishables.

**ISSUE:**

The issue is whether the claimant was discharged for misconduct.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was hired on June 22, 1998, as a full-time cake decorator. The employer talked to the claimant on July 26, 2007, about her punctuality and attendance problems. The claimant improperly reported her absences on July 28 and 29, 2007. The employer again gave the claimant a verbal warning on July 30, 2007. The employer let the claimant have a leave of absence until August 13, 2007, to get her personal life in order. This was a last chance for the claimant to keep her job. She sought mental health treatment for depression. Her health care provider did not give her any work restrictions.

The claimant was supposed to be at work at 4:00 a.m. on August 14, 2007. She overslept and arrived at work at 8:05 a.m. The employer notified the claimant that further infractions of this type could result in termination from employment. On August 18, 2007, the claimant was scheduled to start work at 4:00 a.m. She called at 4:00 a.m. stating she had no gas for her car and her grandmother was ill. The claimant arrived at work at 6:45 a.m. She was scheduled to start work at 8:00 a.m. on August 19, 2007. The employer telephoned the claimant and the claimant arrived at work at 9:10 a.m.

The claimant arrived for work 45 minutes late on August 20, 2007. Her manager told her that he wanted her to arrive at work on time. The two raised their voices and stood close to one another. The claimant pointed her finger at the manager and said he could not tell her what to do. The manager told the claimant to go home. The claimant left and assumed she had been terminated.

## **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was 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.

The employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Three incidents of tardiness or absenteeism after a warning constitutes misconduct. Clark v. Iowa Department of Job Service, 317 N.W.2d 517 (Iowa App. 1982). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). 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 her job. The claimant disregarded the employer's right by repeatedly failing to follow the employer's instructions and appear for work on time. The

claimant did not provide the employer with any physician's excuse for her tardiness. Her failure to have gas in her car, ability to be ready for work on time, or oversleeping, was not excused by her physician. The claimant's disregard of the employer's interests is misconduct. As such, she is not eligible to receive unemployment insurance benefits.

The evidence and record establish that the claimant was overpaid unemployment insurance benefits. The claimant is required by law to repay those benefits to Iowa Workforce Development.

**DECISION:**

The representative's September 21, 2007 decision (reference 01) is reversed. The claimant was discharged from employment for reasons related to job misconduct. Benefits are withheld until such time as the claimant works in and has been paid for wages equal to ten times her weekly benefit amount, provided she is otherwise eligible. The claimant is overpaid \$1,800.00 in unemployment insurance benefits.

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Beth A. Scheetz  
Administrative Law Judge

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Decision Dated and Mailed

bas/kjw