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

MICHAEL T HOUGHTON Claimant	**APPEAL NO. 12A-UI-15206-S2T**
	ADMINISTRATIVE LAW JUDGE DECISION
HY-VEE INC Employer	
	OC: 11/25/12 **Claimant: Appellant (2)**

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Michael Houghton (claimant) appealed a representative's December 19, 2012 decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits because he was discharged from work with Hy-Vee (employer) for violation of known company rule. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for January 30, 2013. The claimant participated personally. The employer was represented by Bruce Burgess, Hearings Representative, and participated by Kasey O'Kelly, Store Director, and Timothy Hyink, Stocker. The employer offered and Exhibits One and Two were received into evidence.

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 9, 2003, as a full-time night stocker. The claimant signed for receipt of the employer's handbook when he was hired and on June 9, 2010. The employer believes it gave the claimant a written warning on July 28, 2009, for leaving work without authorization but the claimant did not receive it.

On January 24, 2011, the claimant called the police to come get his supervisor because his supervisor was intoxicated at work. His supervisor called the claimant and thanked the claimant for ruining his life. After the supervisor went through rehabilitation he was returned to being the claimant's supervisor. The claimant told the store director that the supervisor was not treating him fairly but the store director did not change the claimant's working conditions.

On February 10, 2012, the former store director offered the claimant a final warning and a termination. He told the claimant he could choose. The claimant called the employer's corporate office and said he was being harassed by the store director. The claimant accepted the written warning for failure to follow instructions. The employer notified the claimant that further infractions could result in termination from employment. The store director was issued a warning for his treatment of the claimant. The store director transferred out of that store in April 2012, and a new store director began working. The claimant continued to be under the direction of the supervisor.

On November 14, 2012, the bakery manager told the claimant that the store director authorized the claimant to make a delivery for the bakery. The bakery manager said she would notify the claimant's supervisor. The claimant followed instructions and made the delivery.

The claimant was scheduled to work on November 24, 2012. A co-worker agreed to switch days of work with the claimant and the claimant received authorization on November 19, 2012, from the supervisor that was in charge of the claimant's shift on November 24, 2012, Larry Truitt. On November 24, 2012, the claimant's supervisor issued the claimant a written warning. The warning was for not showing respect to the claimant's supervisor and not getting authorization for trading shifts. The claimant signed for receipt of the warning on November 24, 2012. The employer notified the claimant that further infractions could result in termination from employment.

The employer has an open door policy. The claimant often talked to the store director about concerns he had about his supervisor's behavior. The claimant worked his last day on November 25, 2012. The store director looked over the claimant's warnings and decided to terminate the claimant on November 27, 2012. The employer terminated the claimant for not getting authorization to trade shifts. The employer was unaware that the claimant received authorization from, Larry Truitt.

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. 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 employer was not able to provide any evidence of a final incident of misconduct. First of all, the employer issued the claimant a warning on November 24, 2012, and informed the claimant that further infractions could result in termination from employment. No further incidents occurred after the warning was issued on November 24, 2012. Secondly, the two final incidents were approved by the either the store director or Larry Truitt. The employer has failed to provide any evidence of willful and deliberate misconduct which would be a final incident leading to the discharge. The claimant was discharged but there was no misconduct.

The claimant's and the employer's testimony is inconsistent. The administrative law judge finds the claimant's testimony to be more credible because he was an eye witnesses to the events for which he was terminated.

DECISION:

The representative's December 19, 2012 decision (reference 01) is reversed. The employer has not met its proof to establish job-related misconduct. Benefits are allowed.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

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