

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

KAYSEE A STOUGH
228 WENTLING ST
NASHUA IA 50658

HY-VEE INC
c/o TALX UC EXPRESS
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ST LOUIS MO 63166-0283

HY-VEE INC
c/o TALX UC EXPRESS
4100 HUBBELL #78
DES MOINES IA 50317-4546

Appeal Number: 04A-UI-05706-RT
OC: 04-11-04 R: 02
Claimant: Respondent (2)

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, 4th 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.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-1 – Voluntary Quitting

STATEMENT OF THE CASE:

The employer, Hy-Vee, Inc., filed a timely appeal from an unemployment insurance decision dated May 14, 2004, reference 02, allowing unemployment insurance benefits to the claimant, Kaysee A. Stough. After due notice was issued, a telephone hearing was held on June 24, 2004 with the claimant not participating. The claimant did not call in a telephone number, either before the hearing or during the hearing, where she or any of her witnesses could be reached for the hearing, as instructed in the notice of appeal. Patrick Ohlerking, Store Director, and Amy Roeder, Kitchen Manager, participated in the hearing for the employer. Arthur Pederson, Manager of Operations, was available to testify for the employer but not called because his testimony would have been repetitive and unnecessary. The employer was represented by

David Williams of TALX UC eXpress. Two other individuals for the employer sat in on the hearing but did not participate. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant. A telephone hearing had originally been scheduled for June 16, 2004 at 11:00 a.m. and rescheduled at the employer's request. A notice of that hearing was also sent to the claimant.

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: The claimant was employed by the employer as a part-time kitchen clerk from October 8, 2003 until she voluntarily quit on December 21, 2003. The claimant averaged between 20 and 22 hours per week. The employer has a rule which is covered in orientation that provides that three consecutive absences as a no-call/no-show without properly notifying the employer is considered job abandonment. The claimant was absent for three consecutive days when she was scheduled to work on December 17, December 19 and December 21, 2003 without properly notifying the employer. The employer also has a rule that provides that an employee must call the employee's department manager if that employee is going to be absent or tardy and must do so prior to the start of the employee's shift. The claimant's department manager was Amy Roeder, Kitchen Manager and one of the employer's witnesses. The claimant did not call her on any of the three days absent or the two intervening days when the claimant was not scheduled to work. Ms. Roeder attempted to call the claimant on each day of her absence unsuccessfully. The claimant returned to work on December 22, 2003 and was told that she had been terminated for job abandonment. If the claimant had returned to work appropriately, work would have been available for her. The claimant had been absent in the past and had properly reported these absences. The claimant had received one verbal warning for her attendance.

Pursuant to her claim for unemployment insurance benefits filed effective April 11, 2004, the claimant has received no unemployment insurance benefits. Records indicate that the claimant is disqualified to receive unemployment insurance benefits because of a disqualifying separation from a subsequent employer, Kim Brunner, on April 14, 2004 and disqualified by decision dated May 5, 2004, reference 03. That decision has not been appealed. The claimant had substantial earnings from that employer in the first quarter of 2004.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was.
2. Whether the claimant is overpaid unemployment insurance benefits. She is not because she has received no such benefits.

Iowa Code Section 96.5-1 provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

871 IAC 24.25(1), (4), (20) provide:

Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

(4) The claimant was absent for three days without giving notice to employer in violation of company rule.

(20) The claimant left for compelling personal reasons; however, the period of absence exceeded ten working days.

The administrative law judge concludes that the claimant left her employment voluntarily when she was absent for three consecutive days as a no-call/no-show in violation of the employer's policies when she was absent on three consecutive scheduled days, December 17, December 19, and December 21, 2003. The employer requires that an employee who is going to be absent call the employee's department manager. The claimant's department manager was Amy Roeder, Kitchen Manager. Ms. Roeder credibly testified that the claimant never called her at any material time to inform her of her three absences. Ms. Roeder also credibly testified that she attempted to call the claimant on each of the days the claimant was absent but called unsuccessfully. Accordingly, the administrative law judge concludes that the claimant left her employment voluntarily. The issue then becomes whether the claimant left her employment with good cause attributable to the employer.

The administrative law judge concludes that the claimant has the burden to prove that she has left her employment with the employer herein with good cause attributable to the employer. See Iowa Code Section 96.6-2. The administrative law judge concludes that the claimant has failed to meet her burden of proof to demonstrate by a preponderance of the evidence that she left her employment with good cause attributable to the employer. The claimant did not participate in the hearing and provide evidence of reasons attributable to the employer for her quit. There is no evidence that the claimant's working conditions were unsafe, unlawful, intolerable or that she was subjected to a substantial change in her contract of hire. The employer's witnesses testified that when the claimant finally returned to work on December 22, 2003, she related that she had personal problems. However, there is no direct evidence that the claimant was absent for personal problems or what those personal problems were or that they were compelling personal reasons. Further, the administrative law judge concludes that the claimant did not inform the employer of these absences and for that reason alone, 871 IAC 24.25(20) would not apply to the claimant. There is no evidence that the claimant had any good reason or good cause for not properly informing her department manager of her absences. Leaving work voluntarily because one is absent for three days without giving notice to the employer in violation of the employer's rule is not good cause attributable to the employer.

Accordingly, and for all the reasons set out above, the administrative law judge concludes that the claimant left her employment voluntarily without good cause attributable to the employer, and, as a consequence, she is disqualified to receive unemployment insurance benefits.

Unemployment insurance benefits are denied to the claimant until or unless she requalifies for such benefits.

Iowa Code Section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received no unemployment insurance benefits since separating from her employer herein on or about December 21, 2003 and filing for such benefits effective April 11, 2004. Since the claimant has received no unemployment insurance benefits, she is not overpaid any such benefits. Records indicate that the claimant is presently disqualified to receive unemployment insurance benefits because of a disqualifying separation from a subsequent employer on April 14, 2004 pursuant to a decision dated May 5, 2004, reference 03, which decision has not been appealed.

DECISION:

The representative's decision of May 14, 2004, reference 02, is reversed. The claimant, Kaysee A. Stough, is not entitled to receive unemployment insurance benefits, until or unless she requalifies for such benefits, because she left her employment voluntarily without good cause attributable to the employer. Since the claimant has received no unemployment insurance benefits, she is not overpaid any such benefits.

tjc/tjc