

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**BRANIF M BURKE**  
Claimant

**HY-VEE INC**  
Employer

**APPEAL 16A-UI-11913-DB-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 09/25/16**  
**Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Code § 96.5(1) – Voluntary Quitting  
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment  
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

**STATEMENT OF THE CASE:**

The employer/appellant filed an appeal from the October 25, 2016 (reference 01) unemployment insurance decision that allowed benefits based upon his discharge from employment. The parties were properly notified of the hearing. A telephone hearing was held on November 17, 2016. The claimant, Branif M. Burke, participated personally. The employer, Hy-Vee Inc., was represented by Meg Lorenz and participated through witnesses Wannette Moore and Robert Abshire. The administrative law judge took administrative notice of the claimant's unemployment insurance record.

**ISSUES:**

Was the claimant discharged for disqualifying job-related misconduct?  
Did claimant voluntarily quit the employment with good cause attributable to employer?  
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?  
Can any charges to the employer's account be waived?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed part-time as a night clerk from October 19, 2013 until he was discharged by the employer effective August 12, 2016. Claimant's job duties included unloading product and stocking shelves. Mr. Abshire was claimant's immediate supervisor. Claimant was also employed full-time with another employer.

When claimant was first hired he worked approximately 20-25 hours per week. Claimant's schedule changed with his full-time employer and claimant decided to reduce the number of hours he was working for this employer in 2015. Claimant worked approximately one day every month or so.

August 12, 2016 was claimant's last day physically worked for this employer. Sometime prior to that date claimant and Mr. Abshire had a conversation and claimant told him that he could work more hours. However, the other employees who worked as night clerks had their hours cut after August of 2016.

Mr. Abshire did not put claimant on the schedule to work for any dates after August 12, 2016. Typically Mr. Abshire would contact the claimant to determine whether or not he was available to work. However, there were some occasions where the claimant would let Mr. Abshire know his availability. There was no requirement in place for claimant to contact Mr. Abshire about his availability on a week by week basis. Further, there was no agreement between Mr. Abshire and claimant that it was claimant's responsibility to notify Mr. Abshire of his availability after August 12, 2016.

The claimant has received benefits in the gross amount of \$417.00 for two weeks between October 1, 2016 and October 8, 2016. The employer did participate in the fact-finding interview.

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

For the reasons that follow, the administrative law judge concludes the claimant was discharged for no disqualifying reason. Benefits are allowed.

As a preliminary matter, I find that the Claimant did not quit. Claimant was discharged from employment.

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(4) provides:

(4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

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.

Further, the employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). Further, poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

In this case the claimant did not commit any current act of misconduct which would disqualify him from receiving benefits. Mr. Abshire chose not to put claimant on the schedule after August 12, 2016. This was because hours were being cut in the department.

The employer failed to meet its burden of proof in establishing disqualifying job misconduct. As such, benefits are allowed. Because benefits are allowed, the issues of overpayment and chargeability are moot.

**DECISION:**

The October 25, 2016 (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

---

Dawn Boucher  
Administrative Law Judge

---

Decision Dated and Mailed

db/