

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

AUDREY L MILLER
Claimant

APPEAL NO. 14A-UI-09432-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 08/10/14
Claimant: Respondent (2)

Section 96.5(2)a – Discharge
Section 96.3(7) – Benefit Overpayment

STATEMENT OF THE CASE:

Hy-Vee Inc. filed a timely appeal from a representative's decision dated September 4, 2014 (reference 01) which held claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held on October 1, 2014. Claimant participated. The employer participated by Mr. Phil Hammermeister, Store Director; Ms. Robin Critchlow, Manager of Store Operations; and Ms. Chris Messamer, Assistant Manager.

ISSUE:

At issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered all of the evidence in the record, the administrative law judge finds: Audrey Miller was employed by Hy-Vee Inc. from December 1, 2008 until August 14, 2014 when she was discharged from employment. Ms. Miller held the position of full-time floral manager and was paid by the hour. Her immediate supervisor was the store director, Mr. Phil Hammermeister.

Ms. Miller was discharged on August 14, 2014 because she had violated a specific work directive not to purchase any "hard goods" for the floral department without the permission of Ms. Critchlow, and because the claimant was determined to have "worked off the clock" by visiting a Hy-Vee Inc. wholesale facility while she was off work on Family Medical Leave for a non-work-related illness or injury. Ms. Miller had been specifically warned on March 28, 2014 for time clock violations when she had been doing personally shopping while on the clock, had signed in under another employee's name, had scanned her purchases, and had a second employee punch her out; in violation of known company policies. Company policy requires that employees who do personal shopping, do so off the clock. It also requires that any services that are being performed for Hy-Vee Inc. be done so during scheduled working hours when the employee is clocked in and being paid for their services.

The employer concluded, based upon invoices that the company had received, that Ms. Miller had been performing duties associated with her position as floral manager while she was off the clock and away from work due to an injury, and that the purchases made by Ms. Miller while working off the clock, had been for the floral department for the Hy-Vee facility where Ms. Miller was employed. The employer also concluded that the items purchased and billed to Hy-Vee Inc. by Ms. Miller were the type that the claimant had been specifically told not to purchase without the permission of Ms. Messamer. The employer also believed that Ms. Miller had referred to Ms. Messamer in an inappropriate way and had made disparaging statements about Ms. Messamer's management authority over the floral shop, when Ms. Miller had returned from her medical leave of absence on August 13, 2014.

It is the claimant's position that she did not know that making the purchases for the Hy-Vee floral department while on a medical leave of absence would be considered to be working off the clock and the claimant maintains that the dollar amount of the purchases that she made was substantially lower than what the employer believed. Ms. Miller denies referring to the store operations manager as a "bitch" but agrees that she did make the statement that she was in charge of the floral department and not Ms. Messamer.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits. It does.

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv., 275 N.W.2d 445, 448 (Iowa 1979).

In discharge cases, the employer has the burden of proof. See Iowa Code Section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. of Appeals 1992).

In the case at hand, the evidence establishes that the claimant was specifically instructed not to make any purchases of "hard goods" for the company's floral department without the permission of the store's operations manager. Despite of this specific prohibition, Ms. Miller chose to make substantial purchases of hard goods at a Hy-Vee Inc. wholesale facility for the floral department where she was employed, charging the purchases to the Hy-Vee store where she was employed. The claimant also knew or should have known that performing services for the employer while not clocked in and while receiving disability on a medical leave of absence, would be contrary to the employer's interests and violate the specific warning that had been given to her previously about performing work off the clock. Although the evidence does not establish that Ms. Miller referred to the store operations manager as a "bitch," the evidence does establish that Ms. Miller was not willing to follow the reasonable and work-related directives that had been given to her by store management. The claimant's conduct shows a willful disregard for the employer's interests and reasonable standards of behavior that the employer has a right to expect of its employees under provisions of the Employment Security Law. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, and is otherwise eligible.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. The administrative record reflects the claimant has received unemployment insurance benefits in the amount of \$2912.00 since filing a claim with an effective date of August 10, 2014 for the weeks ending August 23, 2014 through October 4, 2014. The administrative record also establishes that the employer did not participate in the fact-finding interview or make a first-hand witness available for rebuttal.

Iowa Code § 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

- a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

Iowa Admin. Code r. 871-24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)"b" as amended by 2008 Iowa Acts, Senate File 2160.

Because the claimant's separation was disqualifying, benefits were paid to which she was not entitled. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based upon a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant, and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits if it is determined they did participate in the fact-finding interview. Iowa Code § 96.3-7-a, -b.

In this case, the claimant has received benefits but was not eligible for those benefits. Since the employer did not participate in the fact-finding interview, the claimant is not obligated to repay the Agency the benefits she received and the employer's account shall be charged.

DECISION:

The representative's decision dated September 4, 2014 (reference 01) is reversed. The claimant is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, and is otherwise eligible. The claimant has been overpaid unemployment insurance benefits in the amount of \$2912.00, the claimant is not liable to repay this amount. The employer shall be charged, based upon the employer's failure to participate in the fact-finding interview.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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