

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

KENDRA M CRUM
1004 W VALLEY AVE
SHENANDOAH IA 51601-1051

HY-VEE INC
c/o TALX UCM SERVICES INC
PO BOX 283
ST LOUIS MO 63166-0283

HY-VEE INC
c/o TALX UC EXPRESS
3799 VILLAGE RUN DR #511
DES MOINES IA 50317

Appeal Number: 06A-UI-04442-RT
OC: 04/02/06 R: 01
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 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Hy-Vee, Inc., filed a timely appeal from an unemployment insurance decision dated April 18, 2006, reference 01, allowing unemployment insurance benefits to the claimant, Kendra M. Crum. After due notice was issued, a telephone hearing was held on May 25, 2006, with the claimant participating. Brian Wolhoy, Kitchen Manager, and Mandy Bateman, former employee, participated in the hearing for the employer. The employer was represented by David Williams of TALX UC eXpress. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant. An initial hearing in this matter was scheduled for May 11, 2006 at 1:00 p.m. and rescheduled by

the Appeals Section for May 15, 2006 at 1:00 p.m. and rescheduled again at the request of both parties.

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 clerk in the kitchen from March 29, 2005, until she was discharged on April 2, 2006. The claimant averaged between 28 and 30 hours per week. The claimant was discharged for failing to properly follow closing procedures and talking personally on a cell phone when she should have been waiting on customers. Concerning the closing procedures, the claimant is expected to do a number of things in the kitchen area when closing including and especially cleaning. On February 22, 2006, the claimant was given an oral warning for taking shortcuts during the closing procedures and told to avoid cutting corners. The claimant was also warned about cell phone usage. On April 1, 2006, the claimant spilled a mop bucket in the bakery area. The claimant began to clean up the spill but did not finish. The claimant informed her co-worker, Mandy Bateman, former employee and one of the employer's witnesses, that she would go back and finish cleaning the spill, but she never did. Nevertheless, the claimant drug trash bags through the spill making the matter worse. The employer's other witness, Brian Wolhoy, Kitchen Manager, observed the mess himself and then consulted Ms. Bateman who told him about the above.

Concerning cell phone use, again on April 1, 2006, the claimant went on a break and was using a cell phone for personal use. Ms. Bateman was busy and twice tried to call the claimant on the intercom or loudspeaker but the claimant never came to help. Ms. Bateman then had to go get the claimant who was still on her cell phone. The claimant was on a break exceeding 20 minutes but she is only allowed a break of between 15 and 20 minutes. The claimant was seated during her break in the "sit down" area and could see the kitchen from where she was sitting. In addition to the warning on February 22, 2006, which included cell phone usage, the employer posted a notice in July of 2005 about cell phone use. The claimant was aware of the employer's policies that require immediate help of a customer even if on a break or even if on a personal cell phone call and that personal cell phone calls are permitted during break periods although they are discouraged. Pursuant to her claim for unemployment insurance benefits filed effective April 2, 2006, the claimant has received no unemployment insurance benefits. Workforce Development records show no weekly claims filed by the claimant.

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 96.5-2-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).

The parties agree, and the administrative law judge concludes, that the claimant was discharged on April 2, 2006. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer's witnesses credibly testified that on April 1, 2006, the claimant spilled a mop bucket and then did not finish cleaning it up. Although she stated she would go back and clean it up later she did not. The only reason given by the claimant for failing to go back and cleanup the spill was that she "just did not." The claimant works in the kitchen area but the spill was in the bakery area. Both areas are food preparation areas and need to be cleaned. Although the claimant had not finished cleaning up the spill she drug trash bags through the spill making matters worse. At first the claimant testified that she had cleaned up the spill but later conceded that she had not completed the cleaning and conceded that she drug the trash bags through the spill. Also on that day the claimant was using her cell phone during her break for personal calls and missed two pages by her co-worker. The claimant conceded that she was on her cell phone but testified that she "felt" that she was only on her break 20 minutes but the employer's witness, Mandy Bateman, former employee, credibly testified that the claimant was on a break for a half an hour. When the claimant would not respond to the pages, Ms. Bateman had to go and actually get the claimant to come and assist her. The claimant was sitting in the "sit down" area and could see the kitchen counter readily but did not get up and help. The claimant received a written warning covering both the cleaning and closing procedures and cell phone use on February 22, 2006, less than two months before

the incidents on April 1, 2006. Because of the recent written warning and the claimant's rather cavalier attitude as to why she did not finish cleaning up the spill, the administrative law judge concludes that claimant's actions were deliberate acts constituting a material breach of her duties and obligations arising out of her worker's contract of employment and evince a willful or wanton disregard of the employer's interests and are, at the very least, carelessness or negligence in such a degree of recurrence, all as to establish disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct 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 the employer on or about April 2, 2006 and filing for such benefits effective April 2, 2006. Since the claimant has received no unemployment insurance benefits she is not overpaid any such benefits.

DECISION:

The representative's decision of April 18, 2006, reference 01, is reversed. The claimant, Kendra M. Crum, is not entitled to receive unemployment insurance benefits, until, or unless, she requalifies for such benefits, because she was discharged for disqualifying misconduct. Since the claimant has received no unemployment insurance benefits, she is not overpaid such benefits.

cs/pjs