

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**BRADLEY J SHERBURNE**  
Claimant

**APPEAL NO. 07A-UI-08083-DT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**HY-VEE INC**  
Employer

**OC: 07/15/07 R: 03**  
**Claimant: Appellant (1)**

Section 96.5-1 – Voluntary Leaving  
Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

Bradley J. Sherburne (claimant) appealed a representative's August 20, 2007 decision (reference 02) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment from Hy-Vee, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 10, 2007. The claimant participated in the hearing. David Williams of TALX Employer Services appeared on the employer's behalf and presented testimony from three witnesses, Peggy O'Brien, Chuck Irelan, and Kurt Frazier. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUE:**

Was there a disqualifying separation from employment either through a voluntary quit without good cause attributable to the employer or through a discharge for misconduct?

**FINDINGS OF FACT:**

After a prior period of employment with the employer, the claimant most recently started working for the employer on September 11, 2006. He worked part time (32 hours per week) as a night stocker at the employer's Iowa City, Iowa, store location. His regular shift was from 10:00 p.m. to 6:00 a.m., four nights per week. His last day of work was July 13, 2007.

On May 28, 2007, the claimant was given a warning for attendance; he was advised that future absences needed to be documented with medical excuses, and that further unexcused absences could lead to termination. He was absent for a medical reason on June 17, but did not provide a doctor's excuse; he was absent for an unknown reason on July 8, and also did not provide a doctor's excuse.

On July 15, the claimant was a no-call/no-show for his shift; he had prepared to leave for work, but then laid down on his sofa and fallen asleep, missing his shift. On July 16, it began to rain in the evening shortly before 10:00 p.m. The claimant did not have other transportation that

evening, and so was intending on riding his bike to work. When it was raining hard enough at approximately 10:00 p.m. that it would not have been practical to ride the bike, the claimant called the night manager, Mr. Frazier. He told Mr. Frazier what had happened the prior night and indicated he would be late coming in that night because of his needing to ride his bike and the rain. Mr. Frazier told him not to come in that evening. According to Mr. Frazier, he told the claimant that before he could return to work he would need to speak with Mr. Ireland, the manager of store operations. According to the claimant, Mr. Frazier told the claimant that "as far as he knew," the claimant was "done," but also indicated that it was not his decision, but was Mr. Ireland's decision.

The claimant understood he was discharged and did not report in for work for his next scheduled work shifts, including July 17, July 18, July 20, and July 22. When the claimant did not schedule a time to come in to speak with Mr. Ireland and did not report for work, the employer considered the claimant to have quit under its three-day no-call/no-show policy of which the claimant was on notice.

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

A voluntary quit is a termination of employment initiated by the employee – where the employee has taken the action which directly results in the separation; a discharge is a termination of employment initiated by the employer – where the employer has taken the action which directly results in the separation from employment. 871 IAC 24.1(113)(b), (c). A claimant is not eligible for unemployment insurance benefits if he quit the employment without good cause attributable to the employer or was discharged for work-connected misconduct.

Iowa Code § 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.

The claimant asserts that the separation was not "voluntary" as he had not desired to end the employment; he argues that it was the employer's action or inaction which led to the separation and therefore the separation should be treated as a discharge for which the employer would bear the burden to establish it was for misconduct. Iowa Code § 96.6-2; 871 IAC 24.26(21). Rule 871 IAC 24.25 provides that, 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 rule further provides that there are some actions by an employee which are construed as being voluntary quit of the employment, such as when an employee fails to return to work believing they were discharged or were likely to be discharged, but where the employer had not yet actually made and informed the employee of a decision to discharge. 871 IAC 24.25.

Even if the claimant did not hear or retain the statement Mr. Frazier claims to have made that the claimant would have to talk to Mr. Ireland, he admittedly knew that the decision was being made by Mr. Ireland, not Mr. Frazier and he did not follow up with Mr. Frazier; therefore, the separation is considered to be a voluntary quit. The claimant then has the burden of proving that the voluntary quit was for a good cause that would not disqualify him. Iowa Code § 96.6-2. The claimant has not satisfied his burden. Benefits are denied.

In the alternative, even if the claimant reasonably understood Mr. Frazier as telling him that the decision was final and that he was discharged, the result is the same. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982); Iowa Code § 96.5-2-a.

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.

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(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The claimant's final absence on July 15, 2007 and what would have been a tardy on July 16, 2007 were not excused and was not due to illness or other reasonable grounds. Absences due to issues that are of purely personal responsibility such as oversleeping and transportation problems are not excusable. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984); Harlan v. Iowa Department of Job Service, 350 N.W.2d 192 (Iowa 1984). Tardies are

treated as absences for purposes of unemployment insurance law. Higgins, supra. The claimant had previously been warned that future absences could result in termination. Higgins, supra. Treating the separation as a discharge, the employer discharged the claimant for reasons amounting to work-connected misconduct.

**DECISION:**

The representative's August 20, 2007 decision (reference 02) is affirmed. The claimant voluntarily left his employment without good cause attributable to the employer. In the alternative, he was discharged for work-connected misconduct. As of July 16, 2007, benefits are withheld until such time as the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

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Lynette A. F. Donner  
Administrative Law Judge

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Decision Dated and Mailed

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