

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DONALD VINCENT
Claimant

APPEAL NO. 11A-UI-15521-SWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 10/23/11
Claimant: Respondent (2-R)

Section 96.5-2-a – Discharge
Section 96.3-7 – Overpayment of Benefits

STATEMENT OF THE CASE:

The employer appealed an unemployment insurance decision dated November 28, 2011, reference 01, that concluded the Donald Vincent's discharge was not for work-connected misconduct. The hearing held on January 4, 2012, was reopened based on a medical emergency for the claimant that prevented him from participating in the hearing. A reopened telephone hearing was held on January 13, 2012. The parties were properly notified about the hearing. Donald Vincent participated in the hearing. Julia Day participated in the hearing on behalf of the employer with witnesses, Rachel Wright and Tammy Staub.

ISSUE:

Was Donald Vincent discharged for work-connected misconduct?
Was he overpaid unemployment insurance benefits?

FINDINGS OF FACT:

Donald Vincent worked for the employer as a courtesy clerk from March 11, 2005, to November 4, 2011.

On August 1, 2011, the employer adopted a new no-smoking policy. The policy was provided to and explained to Vincent on July 30. The policy stated there was no smoking or use of tobacco on Hy-Vee property or the Harding Hills Shopping Center Complex, including all buildings, parking lots, and sidewalks. The policy stated that employees who wished to smoke were required to punch out and leave the Harding Hills Shopping Center Complex. The policy stated that the first violation of the policy would result in a written warning and the second violation would result in termination.

Vincent violated the no smoking policy by smoking in the Harding Hills Shopping Center Complex on September 1, 2011. The policy was again explained to him, including the provision that he could be discharged if he violated the policy again.

On November 4, 2011, Vincent again violated the employer's policy by smoking a cigarette on a sidewalk in front of another business that was part of the Harding Hills Shopping Center. The manager of store operations watched Vincent finish smoking a cigarette and pull out another one from the pack. When she confronted Vincent, he apologized and requested that he not be fired. The manager brought Vincent in to the store, and the store manager terminated him because he had violated the no-smoking policy after receiving one written warning.

Vincent had filed for partial unemployment insurance benefits effective October 23, 2011. Vincent has received benefits since his discharge on November 4, 2011.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether Vincent was discharged for work-connected misconduct as defined by the unemployment insurance law.

The unemployment insurance law disqualifies claimants discharged for work-connected misconduct. Iowa Code § 96.5-2-a. The rules define misconduct as (1) deliberate acts or omissions by a worker that materially breach the duties and obligations arising out of the contract of employment, (2) deliberate violations or disregard of standards of behavior that the employer has the right to expect of employees, or (3) carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design. 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 misconduct within the meaning of the statute. 871 IAC 24.32(1).

Vincent's violation of a known work rule was a willful breach of his duties and obligations to the employer and a substantial disregard of the standards of behavior the employer had the right to expect of him. I believe the manager's testimony that she witnessed Vincent finish a cigarette and then pull another one out to smoke. The rule was clear that employees were not allowed to smoke anywhere in Harding Hills Shopping Center. Work-connected misconduct as defined by the unemployment insurance law has been established in this case.

The unemployment insurance law requires benefits to be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even if he acted in good faith and was not otherwise at fault. But the law states the overpayment will not be recovered 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 whether or not the overpayment is recovered. Iowa Code § 96.3-7. In this case, Vincent has received benefits but was ineligible for those benefits. The matter of deciding the amount of the overpayment and whether the overpayment should be recovered under Iowa Code § 96.3-7-b is remanded to the Agency.

DECISION:

The unemployment insurance decision dated November 28, 2011, reference 01, is reversed. Donald Vincent is disqualified from receiving unemployment insurance benefits until he has been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The matter of deciding the amount of the overpayment and whether the overpayment should be recovered under Iowa Code § 96.3-7-b is remanded to the Agency.

Steven A. Wise
Administrative Law Judge

Decision Dated and Mailed

saw/pjs