

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOSHUA D HAMILTON
Claimant

APPEAL NO. 09A-UI-16722-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 09/27/09
Claimant: Respondent (2-R)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the October 28, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on December 14, 2009. Claimant Joshua Hamilton participated. Attorney Judith Schulte of Unemployment Insurance Services represented the employer and presented testimony through Joe Deutsch, Store Director, and Jeremy Johnson, Manager of Store Operations.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Joshua Hamilton was employed by Hy-Vee on a full-time basis from 1996 until September 28, 2009 when Joe Deutsch, Store Director, discharged him from the employment. Mr. Hamilton had started the employment as a stocker, but was promoted to full-time Assistant Produce Manager within three months. In June 2008, Mr. Hamilton was promoted to full-time Produce Manager. Joe Deutsch, Store Director, was Mr. Hamilton's immediate supervisor.

Mr. Deutsch had three primary concerns about Mr. Hamilton's fulfillment of the Produce Manager Duties. The first was that the end of the month inventory consistently the \$10,000.00 limit Mr. Deutsch believed was necessary to maximize profitability. Mr. Hamilton was responsible for ordering sufficient produce to meet the store's need and responsible for not over-ordering, which could inflate the end inventory figure.

The second concern was the gross profit. Mr. Deutsch believed a 30 percent gross profit was necessary to maximize profitability. For the period of July, August, and September 2009, the gross profit percentage was 29.71, 18.25, and 26.09 respectively. These figures represented improvement over figures for the same months in 2008 and represented a partial recovery after Wal-Mart's March 2008 entry into the local grocery market.

Mr. Deutsch's third ongoing concern was the sanitary condition of the produce department. When Mr. Deutsch met with Mr. Hamilton for a monthly meeting on June 22, 2009, he raised all three concerns. At that time, Mr. Hamilton told Mr. Deutsch he had not cleaned and sanitized the produce racks for several months. Mr. Hamilton told Mr. Deutsch he would take care of the problem.

When Mr. Deutsch next met with Mr. Hamilton for a monthly meeting on July 27, the gross profit had jumped, but so had the end inventory. In addition, Mr. Deutsch had not cleaned the produce racks.

When Mr. Deutsch next met with Mr. Hamilton for a monthly meeting on August 28, the end inventory was above \$10,000 but had decreased. Gross profit had also decreased substantially. Mr. Deutsch had still not cleaned the produce racks.

Before Mr. Deutsch met with Mr. Hamilton for a monthly meeting on September 28, Mr. Deutsch checked on the condition of the produce racks. He noted thick slime on the rack and down to the drain. The slime was bacterial growth. During the meeting, Mr. Deutsch noted that gross profit had improved, but so had end inventory. Mr. Deutsch also noted that the sanitation issue had still not been resolved. Mr. Deutsch told Mr. Hamilton that he was discharged for failure to meet performance goals.

Mr. Hamilton was the only full-time employee in the produce department during the last months of the employment. Mr. Hamilton had access to a part-time employee. The employer budgeted 65 weekly labor hours for the produce department. The part-time employee generally helped out on Saturdays. Mr. Hamilton knew that he would need to address the sanitation issue at night, when there were fewer customers in the store. Mr. Hamilton decided he would address the sanitation issue when the part-time employee was available. At one point in August, Mr. Hamilton made tentative plans to clean the produce racks, but the plans fell through. Despite the monthly meetings with Mr. Deutsch, Mr. Hamilton never brought to Mr. Deutsch's attention any alleged concerns he had about not being able to obtain assistance from the part-time employee so that he could tend to cleaning and sanitizing the produce racks. At some point, Mr. Hamilton became angry with Mr. Deutsch and decided not to set aside time to clean the racks.

REASONING AND CONCLUSIONS OF LAW:

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.

The employer has the burden of proof in this matter. 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 is not necessarily 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. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985).

In Gilliam v. Atlantic Bottling Company, the Iowa Court of Appeals upheld a discharge for misconduct and disqualification for benefits where the claimant had been repeatedly instructed over the course of more than a month to perform a specific task and was part of his assigned duties. The employer reminded the claimant on several occasions to perform the task. The employee refused to perform the task on two separate occasions. On both occasions, the employer discussed with the employee a basis for his refusal. The employer waited until after the employee's second refusal, when the employee still neglected to perform the assigned task,

and then discharged employee. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990).

The weight of the evidence indicates that the gross profit percentage and the end inventory figure were matters over which Mr. Hamilton exercised significant, but limited, control. The weight of the evidence indicates that Mr. Hamilton made a good faith effort to meet the employer's goals for these areas, but was unable to perform to the employer's satisfaction. Mr. Hamilton's failure to perform to the employer's expectations in regard to these two matters did not constitute misconduct.

The weight of the evidence indicates that the produce department sanitation issue was a matter over which Mr. Hamilton exercised complete control. At the time Mr. Deutsch discharged Mr. Hamilton from the employment, Mr. Hamilton had not taken reasonable steps to properly clean and sanitize the produce racks in *more than eight months*. Three drains had up to an inch and a half of bacterial slime growing from them. The produce cases upon which the high display racks rested were also unsanitary. A reasonable person would conclude that the unsanitary condition of the produce racks represented a public health risk and a liability risk. The employer's repeated directives to Mr. Hamilton to address the problem were reasonable. The weight of the evidence fails to establish that Mr. Hamilton was hindered by his other duties or lack of staff from doing the necessary cleaning and sanitizing work. On the one hand, Mr. Hamilton alleges that he was too busy prepping produce. On the other hand, Mr. Hamilton says the cleaning would have to occur at night when there would be few customers in the store. Mr. Hamilton indicated in his testimony that only once did he make "tentative" plans to clean the racks. When these "tentative" plans fell through, Mr. Hamilton made no other plans to complete the important task. Mr. Hamilton indicated in this testimony that he got mad at Mr. Deutsch and decided not to do the cleaning. At that point, the conduct was no longer mere negligence, but willful disregard of the employer's directive. Mr. Hamilton's ongoing failure to properly clean and sanitize the produce racks constituted insubordination and constituted misconduct in connection with the employment.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Hamilton was discharged for misconduct. Accordingly, Mr. Hamilton is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Hamilton.

Iowa Code section 96.3(7) 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. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will

remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The Agency representative's October 28, 2009, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account shall not be charged.

This matter is remanded to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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