

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

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Appeal Number: 05A-UI-07628-DT
OC: 06/26/05 R: 02
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

Hy-Vee, Inc. (employer) appealed a representative's July 20, 2005 decision (reference 01) that concluded Matthew D. Barkalow (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 18, 2005. The claimant participated in the hearing and was represented by Jerry Wanek, attorney at law. David Williams of TALX UC Express appeared on the employer's behalf and presented testimony from four witnesses, Jim Scott, Julie Hurst, Kevin Hudechek, and Chad Romer. During the hearing, Employer's Exhibits One through Three were entered into evidence. 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 the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on May 1, 1990. Since July 31, 2000 he worked full time as store director of the employer's Windsor Heights, Iowa, store. His last day of work was March 25, 2005. The employer discharged him on that date. The reason asserted for the discharge was falsely inflating inventory figures to expand the store's apparent profitability.

Two of the assistant store managers under the claimant were Mr. Hudechek and Mr. Romer. In approximately October or November 2004, the two had noticed that inventory figures were literally changing on the inventory screen in front of their eyes when only they and the claimant were on duty and had the capacity of changing the figures. From their involvement with their own areas of responsibility in the store, they knew the newly revised figures were incorrect. They did not know what to do at the time, and initially did nothing. After the December 2004 inventory was done on January 3, 2005 (Employer's Exhibit One), they again began to notice subsequent changes to the inventory report. Late in the evening after the January 3, 2005 figures were in, the claimant commented to Mr. Hudechek that the store was in the red and he would be in trouble. Mr. Hudechek left the claimant's office and returned to his own office; a short time later, he saw that the inventory had been changed and was now showing the store in the black.

Over the next several weeks, Mr. Hudechek and Mr. Romer noticed various changes to the December inventory that they knew were incorrect from their direct dealings with the inventory. On February 16, 2005 they printed out the current version of the December inventory (Employer's Exhibit Two) and itemized some entries that they knew were incorrect (Employer's Exhibit Three), which had the net effect of putting the store in the black. Mr. Hudechek then contacted a higher level produce supervisor he knew to ask what they should do, who put them in touch with Mr. Scott, a regional vice-president of operations. They then explained their concerns to Mr. Scott.

Mr. Scott informed a corporate operations manager of the allegations. That manager then met with the claimant on March 1, 2005 with the purported reason being to generally review some prior inventories because of a supposedly missing calculator tape. When the claimant indicated he had turned over all of the calculation tapes, the manager indicated only that there would be a new inventory done to try to reconstruct the information from the supposedly lost tape. The claimant was not informed of the allegations against him or told that there was an investigation regarding the possibility that he had intentionally falsified the inventory reports.

A new inventory was completed on March 6, 2005 that indicated that the store was in the red rather than in the black; various items and categories stated on the February 16, 2005 December inventory information were found not to exist. Still no action was taken at that time, as the employer determined it needed more time to review the results and its options. The claimant was ultimately informed on March 26, 2005 of the decision to release him from his position.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not

whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate questions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

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 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 focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
 - a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
 - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
 - a. Manifest equal culpability, wrongful intent or evil design; or
 - b. Show an intentional and substantial disregard of:
 1. The employer's interest, or
 2. The employee's duties and obligations to the employer.

Henry, supra. The reason cited by the employer for discharging the claimant is his falsification of the inventory information. However, there is no current act of misconduct as required to establish work-connected misconduct. 871 IAC 24.32(8); Greene v. Employment Appeal Board, 426 N.W.2d 659 (Iowa App. 1988). The employer knew at least of the allegations on or about February 16, 2005, and knew the allegations were confirmed at least by March 6, 2005, yet the employer's discharge of the claimant did not take place until March 25, 2005, about five weeks after initial notice of the allegations and even nearly three weeks after confirmation of the allegations. The employer has not met its burden to show disqualifying misconduct. Cosper, supra.

DECISION:

The representative's July 20, 2005 decision (reference 01) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

ld/tjc