

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

DEB J JAEGER
523 W 7TH ST
LAMONI IA 50140

HY-VEE INC
C/O TALX UCM SERVICES INC
P O BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 05A-UI-04726-S2T
OC: 03/27/05 R: 03
Claimant: Respondent (4)

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 96.4-3 – Able and Available
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Hy-Vee (employer) appealed a representative's April 28, 2005 decision (reference 03) that concluded Deb Jaeger (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on May 27, 2005. The claimant participated personally. The employer was represented by David Williams, Manager of Operations, and participated by Sean Allen, Assistant Store Director, and Debra Sinclair, Main Checker. Marla Gentry observed the hearing.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on April 27, 2004, as a full-time main checker and video person. On June 28, 2004, the claimant requested that her hours be reduced so she could spend time with her children. The employer complied and scheduled the claimant 20 to 25 hours per week. On August 2, 2004, the claimant requested that her hours be reduced to one or two hours per week on Sunday. The employer complied and had the claimant work in the video section exclusively.

On or about November 14, 2005, the employer explained to the claimant that he needed the claimant to train someone else to work in video because one or two hours per week were not enough. The employer repeatedly asked the claimant if she could work more hours. The claimant was working daytime hours as a teacher's aid and stayed with her children during the week. She could not work more hours on the weekend without consulting with her husband who had a varying schedule. The claimant never informed the employer of any other hours she could consistently work besides the one to two hours on Sunday. The employer did not schedule the claimant to work after November 14, 2004. The claimant filled in for absent employees on two days. Her last day of work was December 8, 2004. She did not request any further hours.

REASONING AND CONCLUSIONS OF LAW:

The first issue is whether the claimant was discharged for misconduct. For the following reasons the administrative law judge concludes she was not.

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 employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The employer stopped scheduling the claimant for work and has the burden of proof to show misconduct. The employer did not provide any evidence of misconduct at the hearing. Consequently the employer did not meet its burden of proof to show misconduct.

The next issue is whether the claimant was able and available for work. For the following reasons the administrative law judge concludes she is not.

871 IAC 24.23(8)(16)(23) provides:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

(8) Where availability for work is unduly limited because of not having made adequate arrangements for child care.

(16) Where availability for work is unduly limited because a claimant is not willing to work during the hours in which suitable work for the claimant is available.

(23) The claimant's availability for other work is unduly limited because such claimant is working to such a degree that removes the claimant from the labor market.

When an employee does not have adequate childcare, is not willing to work suitable hours or is working to such a degree to remove her from the work force, she is considered to be unavailable for work. The claimant was working, taking care of her children and was not willing to work suitable hours. The claimant is considered to be unavailable for work from December 8, 2004. The claimant is disqualified from receiving unemployment insurance benefits from December 8, 2004, due to her unavailability for work.

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 claimant has received benefits in the amount of \$2,672.00 since filing her claim herein. Pursuant to this decision, those benefits now constitute an overpayment which must be repaid.

DECISION:

The representative's April 28, 2005 decision (reference 03) is modified in favor of the appellant. The claimant was discharged. Misconduct has not been established. Benefits are allowed provided the claimant is otherwise eligible. The claimant is disqualified from receiving unemployment insurance benefits from December 8, 2004, due to her unavailability for work. The claimant is overpaid benefits in the amount of \$2,672.00.

bas/s