

BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

DIANE E GOODWIN

Claimant,

and

HY-VEE INC

Employer.

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HEARING NUMBER: 09B-UI-04859

EMPLOYMENT APPEAL BOARD
DECISION

NOTICE

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT IS FILED WITHIN 30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-2-a

DECISION

UNEMPLOYMENT BENEFITS ARE DENIED

The employer appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The claimant, Diane E. Goodwin, worked for Hy-Vee, Inc. as a part-time night stocker from March 30, 2006 through February 3, 2009. (Tr. 4-5) At the start of her hire, the employer sent the claimant through an orientation wherein the employer's attendance policy was explained and a packet was issued. (Tr. 7-8) During the summer months, the claimant worked 8:00 a.m.-2:00 p.m. in the cook shack. (Tr. 8) During the off season (fall and winter), she usually worked from 4:00 p.m.-4:00 p.m. until November of 2008 when she was scheduled to work from 2:00 p.m.-9:00 p.m. stocking shelves. (Tr. 4, 8, 9)

On December 26, 2008, the claimant was a no call/no show for which she contacted the employer (Eric

Gross) to explain her circumstances (intoxication) 10 hours later. (Tr. 12-13, 20) The employer issued her first verbal warning, even though she had already been tardy several times prior. (Tr. 7, 12-13) The

claimant experienced several other episodes of tardiness citing oversleeping as the excuse throughout that month. She received both verbal and written warnings from Scott Johnson (store manager) and Mike Morrissey (manager of store operations). (Tr. 7-8, 13) Ms. Goodwin never stated she had difficulty with her relatively new schedule (Tr. 9) nor did she ever request a shift change. (Tr. 14)

Throughout the month of January, the claimant continued to be regularly tardy. (Tr. 25-26) She received additional verbal warnings. (Tr. 13-15) By mid-January, Ms. Goodwin informed Mr. Johnson and others that she had a sleep disorder (narcolepsy) for which she took medication (Tr. 21-22, 24, 26, 28) that caused her to oversleep. (Tr. 10-11, 13-14, 15, 21) The employer encouraged her to seek additional treatment, which the claimant did (Tr. 24, 25, 27), but never submitted any medical documentation as requested. (Tr. 14, 16) She'd been under a doctor's care since February/March of last year. (Tr. 27) Ms. Goodwin told Kelly Carruthers (claimant's immediate supervisor- Tr. 18) that she oftentimes stayed up all night and would sleep in the following day as the reason for her tardiness. (Tr. 17)

On January 30th, the claimant was late, again; the employer warned her that if she were late again, she would be terminated. (Tr. 14-15, 29-30, 31, 33) On February 5th, the claimant got ready to go to work, then dozed off, not awakening until 3:30 p.m. (Tr. 28-29) The claimant failed to call in or report to work on February 5, 2009 and was subsequently terminated (Tr. 7, 11, 30)

The claimant submitted didn't doctor's note until several weeks (February 24, 2009) after her termination. (Tr. 27, 33, Exhibit A)

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2009) provides:

Discharge for Misconduct. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:

The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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 Iowa Supreme court has accepted this definition as reflecting the intent of the legislature. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665, (Iowa 2000) (quoting Reigelsberger v. Employment Appeal Board, 500 N.W.2d 64, 66 (Iowa 1993)).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 NW2d 661 (Iowa 2000).

The record clearly establishes that Ms. Goodwin was excessively tardy even after numerous warnings were issued (Tr. 7-8, 13, 15), that final of which she was put on notice that her job was in jeopardy should she be late again. (Tr. 14-15, 29-30, 31, 33) Both parties acknowledge that she understood this predicament. Her purported reason for her excessive attendance infractions was due to oversleeping because of a medical condition (narcolepsy). Although the record is unclear whether the employer disbelieved her excuse, the record is void of any corroborating evidence to verify her condition as the reason for her poor attendance. On one occasion, both parties acknowledge she was absent due to personal reasons, i.e., intoxication. (Tr. 12-13, 20) On another occasion, Ms. Goodwin explained to her immediate supervisor that "... she would stay up all night the night before and come to work without sleeping... the next morning ... she would sleep in..." (Tr. 17)

A prudent person would have gone through extraordinary measures to protect his/her employment by furnishing the necessary medical documentation. Ms. Goodwin, however, failed to comply with the employer's directive to provide such documentation. (Tr. 14, 16) Although the claimant denies ever being told to supply this information (Tr. 24), we find the employer's testimony more credible in this regard. Had the employer obtained this documentation, the employer could have and would have accommodated Ms. Goodwin by adjusting her hours. The claimant, herself, never requested any special accommodations given her precarious employment situation. Her behavior is not that of a reasonable person set on securing her position, which leads us to find her testimony less credible. In light of Ms. Goodwin's acknowledgment that she knew she had one more chance based on her January 30th warning (including past warnings), we conclude that the employer satisfied their burden of proof.

DECISION:

The administrative law judge's decision dated April 24, 2009 is **REVERSED**. The claimant was discharged for disqualifying misconduct. Accordingly, she is denied benefits until such time she has worked in and has been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. See, Iowa Code section 96.5(2)"a".

Elizabeth L. Seiser

AMG/fnv

Monique F. Kuester

DISSENTING OPINION OF JOHN A. PENO:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

John A. Peno

AMG/fnv