

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ANN L KEHM
Claimant

APPEAL NO. 08A-UI-10367-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 09/21/08 R: 03
Claimant: Respondent (2/R)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed an appeal from a decision of a representative dated October 31, 2008, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on November 20, 2008. The claimant participated. The employer participated by Tom Spear, Employer Representative and witnesses Jim Lingo, Store Director, Nicole Webber and Mike Johnson. Employer's Exhibits One through Seven were received into evidence.

ISSUE:

At issue in this matter is whether the claimant was discharged for misconduct in connection with her work and whether the claimant is overpaid unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge having heard the testimony and considered all of the evidence in the record, finds: The claimant worked for this employer from February 7, 1989 until September 11, 2008 when she was discharged from employment. Ms. Kehm held the position of checker and was paid by the hour. Her immediate supervisors were Nicole Webber and Jim Lingo.

A decision was made to terminate the claimant based upon an incident that took place on September 11, 2008. On that date a customer specifically complained about Ms. Kehm's rudeness and demeanor while waiting on the customer. The customer complained that she inquired twice whether the checkout station was open and did not hear the claimant's response until she "snapped" the answer yes. The customer further complained that the claimant was very unfriendly thereafter delaying completing the checkout procedure and greatly upsetting the customer. Nicole Webber, the manager on duty, spoke with the customer and informed the store director of the most recent complaint. Because Ms. Kehm had been repeatedly warned for similar conduct in the past, a decision was made to terminate the claimant from employment. The claimant was given the opportunity to resign in lieu of being discharged and did so.

It is the claimant's position that she was not intentionally rude to the customer in question but feels that the customer was upset because a credit card had been declined. The claimant also believes that she should have received progressive discipline before being discharged.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Kehm was discharged for misconduct in connection the employment. It does.

Here the evidence in the record establishes that Ms. Kehm had been repeatedly warned for similar conduct on numerous occasions prior to her discharge. The company prides itself in friendly service and strives to maintain customers at each of its locations. The claimant had been warned specifically in the past for displaying an angry demeanor, delaying properly servicing customers, rudeness and was aware that further conduct of this nature could result in her termination from employment.

A decision was made to terminate the claimant based upon the personal observations of another company employee who verified that the customer's complaints regarding Ms. Kehm's conduct on September 11, 2008 were justified.

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.

For the reasons stated herein the administrative law judge concludes that the employer has sustained its burden of proof in establishing that the claimant was discharged for misconduct. Unemployment insurance benefits are withheld.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

DECISION:

The representative's decision dated October 31, 2008, reference 01, is reversed. The claimant was discharged for misconduct. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount. The administrative law judge remands to the Claims Division the issue

of whether there has been an overpayment, the amount of the overpayment and whether the claimant will have to repay benefits.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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