

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RONDA E SWEARINGEN
Claimant

APPEAL NO. 08A-UI-04178-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 09/16/07 R: 04
Claimant: Respondent (1)

Section 96.5(2)b – Gross Misconduct

STATEMENT OF THE CASE:

Hy-Vee, Inc. filed an appeal from a representative's decision dated October 15, 2007, reference 01, which held that no disqualification would be imposed regarding Ronda Swearingen's separation from employment. Due notice was issued scheduling a hearing by telephone on December 13, 2007. Prior to the hearing, the employer withdrew the appeal. The appeal was granted by an administrative law judge in a decision dated December 5, 2007.

The employer attempted to appeal the December 5, 2007 administrative law judge's decision to the Employment Appeal Board on February 20, 2008. On March 17, the Employment Appeal Board held that the appeal was untimely. The decision noted that the employer could contact the Claims Section of Iowa Workforce Development to pursue the issue of gross misconduct. On March 28, the employer requested that Workforce Development redetermine the claim under the gross misconduct provisions of the law. A determination was issued on April 25, 2008, reference 02, holding that gross misconduct in connection with the employment had not been established.

The employer appealed the April 25, 2008 determination. After notice was issued, a hearing was held by telephone on May 22, 2008. The notice did not list "gross misconduct" as an issue for the hearing. However, both parties waived notice on the issue. Ms. Swearingen participated personally and was represented by Curtis Dial, Attorney at Law. The employer participated by Chuck Osmanski, Store Director, and was represented by Tim Speir of Unemployment Insurance Services. Exhibits One and Two were admitted on the employer's behalf.

ISSUE:

At issue in this matter is whether Ms. Swearingen was discharged by Hy-Vee, Inc. for gross misconduct in connection with her employment.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all of the evidence in the record, the administrative law judge finds: Ms. Swearingen began working for Hy-Vee, Inc. in January of 2000. She was last employed as a pharmacy tech and worked approximately

30 hours each week. She was placed on a leave of absence after she was arrested at the store on May 22, 2007. Ms. Swearingen was subsequently charged with possession with the intent to distribute marijuana, a tax stamp violation, the manufacture of marijuana, and keeping a drug house. She was to remain on a leave of absence until such time as there was a resolution of the pending charges.

As of September 14, 2007, there still had been no disposition of the charges against Ms. Swearingen. She had exhausted all available paid leave time and was not given the opportunity to take leave without pay. The employer considered her alleged conduct to be in violation of its work rules and, therefore, discharged Ms. Swearingen. The employer's written policy prohibits the possession and use of illegal drugs on the work premises, whether on or off duty. Selling or making arrangements for the sale of illegal drugs on company property is likewise prohibited. The employer's policy further provides that "[c]onvictions for illegal drug related crimes will be grounds for immediate dismissal."

All of the criminal charges against Ms. Swearingen were dismissed except that of keeping a drug house. As part of a plea agreement, she entered a plea of guilty to the charge. She appeared for sentencing on March 7, 2008. On March 10, 2008, the Iowa District Court for Lee County, Judge Michael J. Schilling presiding, entered an order deferring judgment. Ms. Swearingen was placed on probation for two years and ordered to pay specified costs.

REASONING AND CONCLUSIONS OF LAW:

If the gross misconduct provisions of the law are implicated, a claim may be redetermined within five years from the effective date of the claim. The employer's March 28, 2008 request for redetermination was well within five years of Ms. Swearingen's claim filed effective September 16, 2007. Therefore, the administrative law judge has jurisdiction over the matter.

The employer does not dispute that the conduct on which Ms. Swearingen's separation was based did not occur on Hy-Vee property or while she was working on behalf of Hy-Vee. The work rule she is said to have violated provides for dismissal if an individual is convicted of a drug-related crime. The rule does not, on its face, limit its applicability to crimes committed on the work property or while performing work-related duties. Therefore, an individual could be discharged as a result of off-duty conduct. Off-duty conduct that violates a specific work rule may constitute job-related misconduct. See Kleidosty v. Employment Appeal Board, 482 N.W.2d 416 (Iowa 1992).

The fact that Ms. Swearingen's conduct was connected to her employment does not end the inquiry. The gross misconduct provisions of the law, as well as the employer's own rules, require a conviction for the conduct. Iowa Code section 96.5(2)b. Absent a conviction, the statute requires that the individual have signed a statement admitting commission of the act. There was no evidence that Ms. Swearingen signed a statement admitting to the criminal conduct for which she was charged. The parties dispute whether there has been a conviction. The evidence establishes that she received a deferred judgment for the crime of keeping a drug house. The issue then is whether a deferred judgment constitutes a conviction within the meaning of section 96.5(2)b.

Iowa Code section 907.1(1) defines a "deferred judgment" as a sentencing option whereby both the adjudication of guilt and the imposition of a sentence are deferred by the court. The court retains the power to pronounce judgment and impose a sentence if the conditions for the deferred judgment are not satisfied. A deferred judgment differs from a deferred sentence in that there is an adjudication of guilt but no imposition of a sentence when a deferred sentence is

given. Iowa Code section 907.1(2). Because Ms. Swearingen received a deferred judgment, the administrative law judge must conclude that there has been no adjudication of her guilt. As such, she has not been convicted of the crime of keeping a drug house.

Having concluded that Ms. Swearingen was not convicted of a crime, it is concluded that gross misconduct has not been established. Therefore, there is no basis for disqualification under section 96.5(2)b. The issue of whether Ms. Swearingen was discharged for simple misconduct under section 96.5(2)a is moot as the employer withdrew its appeal on the issue and the decision allowing the withdrawal became final agency action in the absence of a timely appeal.

For the reasons stated herein, the administrative law judge concludes that the employer has failed to satisfy its burden of proving gross misconduct within the meaning of the law. Accordingly, benefits are allowed.

DECISION:

The representative's decision dated April 25, 2008, reference 02, is hereby affirmed. Ms. Swearingen was discharged by Hy-Vee, Inc. but gross misconduct has not been established. Benefits are allowed, provided she satisfies all other conditions of eligibility.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/css