

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRADLEY MCKENZIE
Claimant

APPEAL NO. 13A-UI-11853-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 09//22/13
Claimant: Respondent (2)

Iowa Code § 96.5(2)(a) - Discharge for Misconduct
Iowa Code § 96.3-7 - Overpayment

STATEMENT OF THE CASE:

Hy-Vee, Inc. (employer) appealed an unemployment insurance decision dated October 16, 2013, reference 01, which held that Bradley McKenzie (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on November 14, 2013. The claimant participated in the hearing. The employer participated through Kim Jaber, Store Director; Ashley Lewis, Human Resources Manager; and Ajah Anderson, Employer Representative. Employer's Exhibits One through Six were admitted into evidence.

ISSUES:

The issues are whether the claimant is disqualified for benefits, whether he was overpaid unemployment insurance benefits, whether he is responsible for repaying the overpayment and whether the employer's account is subject to charge.

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 as a part-time employee on August 26, 1986 but he was a full-time kitchen manager at the time he was discharged on September 26, 2013 for violation of time and attendance policies. The store director was out of the store on September 9, 2013 when the assistant director received a complaint from employees about the claimant. He had repeatedly asked his subordinates to punch him out on the time clock after he had already left and was no longer present in the store. The employees were uncomfortable doing this but were reluctant to refuse.

Employees are assigned a confidential, four digit number to enter into the time clock to punch in and out of their shifts. These numbers are not to be shared with fellow employees. A time adjustment document is placed near the time clock for members of management to adjust their or their employee's time records if needed. The claimant had used this time adjustment document in the past. The assistant director forwarded the information to the loss prevention department to investigate.

Zac Rinderknecht of Loss Prevention notified the store director on September 16, 2013 that the investigation was complete. On numerous occasions, surveillance recordings confirmed the claimant left the store at one time while his time records showed he worked much later. Specifically, on July 22, 2013, he left work at 4:20 p.m. but clocked out at 5:59 p.m. On September 1, 2013, he left work at noon but clocked out at 1:09 p.m. and on September 8, 2013, he left work at 2:30 p.m. but clocked out at 3:49 p.m. A meeting was scheduled on the following week to question the claimant about it.

The employer met with the claimant on September 26, 2013 and he admitted his actions but denied they were a violation of company policy. During the previous summer, the store director became aware of the claimant working on schedules at home and she specifically advised him he was not allowed to do this. The assistant store director was also aware of this directive given to the claimant by the store director. However, the claimant denies he was given this directive and testified that the store directive merely indicated she would prefer he work on schedules at the store. The claimant was discharged at the end of the meeting.

The claimant filed a claim for unemployment insurance benefits effective September 22, 2013 and has received benefits after the separation from employment in the amount of \$2,634.00.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. 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. 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. 871 IAC 24.32(1).

The employer has the burden to prove the discharged employee is disqualified for benefits for misconduct. *Sallis v. Employment Appeal Bd.*, 437 N.W.2d 895, 896 (Iowa 1989). The claimant was discharged on September 26, 2013 for inappropriate activity and falsification of time records. While he denies doing anything wrong, he clearly falsified time records and coerced his subordinates to be a part of his fraudulent activity. If the claimant needed to clarify a time, he needed to do it on the time adjustment sheet which is why it is placed next to the time clock. The claimant's conduct shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of his duties and obligations to the employer. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

Because the claimant has been deemed ineligible for benefits, any benefits he has received could constitute an overpayment. The unemployment insurance law requires benefits be recovered from a claimant who receives benefits from an initial decision and is later denied benefits from an appeal decision, even though the claimant acted in good faith and was not otherwise at fault. In some cases, the claimant might not have to repay the overpayment if both of the following conditions are met: 1) there was no fraud or willful misrepresentation by the claimant; and 2) the employer failed to participate in the fact-finding interview. If the overpayment is waived due to the employer's failure to participate, that employer's account continues to be subject to charge for the overpaid amount. See Iowa Code § 96.3-7.

In the case herein, a waiver cannot be considered because both parties participated in the fact-finding interview. See 871 IAC 24.10. Its account is not subject to charge and the claimant is responsible for repaying the overpayment amount of \$2,634.00.

DECISION:

The unemployment insurance decision dated October 16, 2013, reference 01, is reversed. The claimant is not eligible to receive unemployment insurance benefits because he was discharged from work for misconduct. Benefits are withheld until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant is overpaid benefits in the amount of \$2,634.00.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/css