

**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**

**JAMIE L GULLEY
3306 – 2ND AVE
DES MOINES IA 50313**

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

**TALX UC EXPRESS
3799 VILLAGE RUN DR #511
DES MOINES IA 50317**

**Appeal Number: 05A-UI-05561-JTT
OC: 04/10/05 R: 02
Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

Hy-Vee filed a timely appeal from the May 20, 2005, reference 02, decision that allowed benefits. After due notice was issued, a hearing was held on June 14, 2005. Jamie Gulley participated. David Williams of TALX UC Express represented Hy-Vee and presented testimony through Conference Center Services Manager Emily Fish. Exhibit A was received into evidence.

FINDINGS OF FACT:

Jamie Gulley was employed by Hy-Vee as a part-time conference center server from January 5, 2004 until October 13, 2005, when Conference Services Manager Emily Fish concluded Ms. Gulley had abandoned the employment.

In June 2005, Ms. Gulley had notified Conference Services Manager Emily Fish that she wanted to go on an indefinite leave so that she could focus on her studies. Ms. Gulley continued as a Hy-Vee employee, with the understanding that she would contact Ms. Fish when she was ready to come back to work. Shortly thereafter, Ms. Gulley commenced working weekend hours only.

At the end of August 2004, Ms. Gulley notified Ms. Fish that she was ready to commence working more hours. Ms. Fish had already distributed the work schedules for September and Ms. Gulley had already received her September schedule of weekend only hours. However, Ms. Fish was able to provide Ms. Gulley with additional shifts. Ms. Gulley worked for Hy-Vee on September 1, 3, 8, 18, 19, and 25.

Ms. Gulley did not receive a work schedule for October. On September 25, Ms. Gulley picked up her paycheck and expected to pick up her October work schedule. Ms. Fish was not present at the workplace that day. Ordinarily, Ms. Fish would provide Ms. Gulley with a work schedule a week or two before the start of the month when the schedule would be in effect. Otherwise, Ms. Fish would provide Ms. Gulley her work schedule when Ms. Gulley came to collect her paycheck. Though Ms. Gulley did not ordinarily receive her schedule via the telephone, the employer would sometimes call her and ask her to work on short notice. On Sunday, September 26, Ms. Gulley telephoned Ms. Fish and left a message on her answering machine, in which she indicated she had not received an October schedule and provided a return telephone number. Ms. Gulley did not receive a return telephone call. On Monday, September 27, Ms. Gulley telephoned Ms. Fish's supervisor, Kevin Jurasek, left the same message and phone number. Ms. Gulley then telephoned Ms. Fish and left the same message and phone number. Ms. Gulley was aware that the Hy-Vee conference center sometimes experienced a slow period during which less work would be available. Ms. Gulley concluded that was probably what had happened and gave up on working in October.

Ms. Fish had actually placed Ms. Gulley on the October schedule and had scheduled Ms. Gulley to work on October 6, 13, 17, 26, and 31. After Ms. Gulley was a no-call/no-show for her shifts on October 6, and October 13, Ms. Fish attempted to contact Ms. Gulley by telephone, left a telephone message, but received no response. Ms. Gulley did not receive a message. Ms. Fish then concluded that Ms. Gulley had voluntarily quit the employment and terminated the employment under a theory of job abandonment.

Toward the end of October, Ms. Gulley telephoned Hy-Vee and left a voice mail message for Ms. Fish, but did not hear back from the employer. Thereafter, Ms. Gulley returned to employment through the temporary employment agency that had originally brought her in contact with Hy-Vee. Ms. Gulley did not make any additional attempts to contact Hy-Vee.

REASONING AND CONCLUSIONS OF LAW:

The first question for the administrative law judge is whether the evidence in the record establishes that Ms. Gulley voluntarily quit the employment. It does not.

A person who voluntarily quits employment is disqualified for unemployment insurance benefits unless the evidence establishes that the quit was for good cause attributable to the employer. See Iowa Code section 96.5(1). The employer has the burden of proving the disqualification for benefits. See Iowa Code section 96.6(2). A person who is absent for three consecutive shifts without notifying the employer in violation of a company rule is presumed to have voluntarily quit the employment without good cause attributable to the employer. See 871 IAC 24.25(4). In

general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992).

The evidence in the record fails to establish that Ms. Gulley intended to sever the employment relationship or that she engaged in any overt act that indicated an intention to quit. On the contrary, Ms. Gulley had contacted the employer at the end of August and specifically requested to return to a heavier work schedule. Ms. Gulley worked the heavier work schedule in September by picking up shifts after the schedule had been distributed, and was looking forward to working the heavier work schedule in October. The evidence establishes that Ms. Fish thought she had provided Ms. Gulley with an October work schedule, but had not. The employer concluded that Ms. Gulley had abandoned the employment after she appeared to be a no-call/no-show for two consecutive shifts, and terminated the employment relationship. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Gulley did not quit the employment, but was discharged by the employer on or about October 13.

The next question, then, is whether the evidence in the record establishes that Ms. Gulley was discharged for misconduct in connection with the employment. It does 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).

Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

The evidence in the record establishes that Ms. Gulley's absences on October 6 and 13 were unintentional and were due to the fact that, despite her repeated efforts, Ms. Gulley had been unsuccessful in obtaining her October work schedule. The administrative law judge concludes that Ms. Gulley was discharged for no disqualifying reason. Accordingly, Ms. Gulley is eligible for benefits, provided she is otherwise eligible.

This case came down to the relative reliability of the testimony provided by Ms. Gulley and Ms. Fish. Both witnesses provided forthright testimony. The administrative law judge found Ms. Gulley's testimony to be more reliable. Ms. Gulley was responsible for only one work schedule, her own. Ms. Fish was responsible for several or many work schedules. Ms. Gulley testified in detail about her shift on September 25, the fact that Ms. Fish was not there that day, and the subsequent steps she took in an attempt to acquire her work schedule. The administrative law judge concluded that Ms. Fish's memory was unreliable as to the month in which she provided Ms. Gulley's schedule by telephone and whether she had worked on September 25.

DECISION:

The Agency representative's decision dated May 20, 2005, reference 02, is affirmed. The claimant did not voluntarily quit the employment. The claimant was discharged for no disqualifying reason and is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to the claimant.

jt/sc