

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**VICENTE D COLLAGUAZO**  
Claimant

**APPEAL NO. 16A-UI-07361-S1-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**HY-VEE INC**  
Employer

**OC: 06/05/16**  
**Claimant: Respondent (1)**

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

**STATEMENT OF THE CASE:**

Hy-Vee (employer) appealed a representative's June 22, 2016, decision (reference 01) that concluded Vicente Collaguazo (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for July 21, 2016. The claimant participated personally. The employer was represented by James Tranfaglia, Hearings Representative, and participated by Bryan Franzoni, Store Director, and Rebekah Howard, Human Resources Manager. The employer offered and Exhibits One and Two were received into evidence.

**ISSUE:**

The issue is whether the claimant was separated from employment for any disqualifying reason.

**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 on June 6, 2015, as a full-time night stock clerk. The claimant signed for receipt of the employer's handbook on June 6, 2015. The handbook states that "[t]hree or more unexcused absences or three or more instances of tardiness can result in disciplinary action up to and including termination. An employee must contact their department manager when they are sick. Text messaging is not accepted. Daily contact is required unless approval is granted by a manager. The employer did not issue the claimant any warnings during his employment.

On May 14, 2016, the claimant did not appear for work or notify the employer of his absence. On May 16, 2016, the claimant communicated with the employer by text that he would not be at work on May 16 and 17, 2016. The employer considered both absences properly reported. Among other reasons for the absence, the claimant said his back was "killing" him. On May 18, 2016, the claimant provided a doctor's note to the employer that excused him from work from

May 18 to May 24, 2016. On May 25, 2016, the claimant provided the employer with a doctor's note that excused him from work from May 25 to June 3, 2016. The claimant reported a work-related back injury. On June 6, 2016, the employer terminated the claimant for three unexcused absences.

The claimant filed for unemployment insurance benefits with an effective date of June 5, 2016. The employer participated personally at the fact-finding interview on June 21, 2016, by Rebekah Howard and Bryan Franzoni.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incidents of absenteeism were properly reported illness which occurred on May 16 and 17, 2016. The claimant's absences do not amount to job misconduct because they were properly reported. The employer has failed to provide any evidence of willful and deliberate misconduct which would be a final incident leading to the discharge. The claimant was discharged but there was no misconduct.

**DECISION:**

The representative's June 22, 2016, decision (reference 01) is affirmed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

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Beth A. Scheetz  
Administrative Law Judge

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Decision Dated and Mailed

bas/pjs