

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LEEJA KUBIK
Claimant

APPEAL NO. 12A-UI-04107-WT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 02/26/12
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a fact-finding decision dated April 3, 2012, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on May 4, 2012. Claimant participated personally. Employer participated by Susan Myrise, Representative from Corporate Cost Control. In addition, Wes Snook, the Store Director, Jessica Monical, Manager of Store Operations and Laura Rasmussen, Manager of Perishables, were all present. Exhibits A through C were admitted into evidence.

ISSUE:

The issue in this matter is whether claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds:

Claimant was employed as a full-time clerk in the Deli. Claimant was discharged on March 1, 2012 by employer due to suspicion of time card fraud. The claimant reported to the Deli supervisor, Sheri Wilson. Ms. Wilson was being investigated for time card fraud in February 2012. This investigation began because management was looking for Ms. Wilson at one point in time and could not find her although she was clocked in. This lead to an expanded investigation where the employer believed a suspicious correlation existed between the claimant's time card and her assistant manager.

On March 1, Ms. Wilson alleged that Ms. Kubik punched her in. Ms. Wilson had not asked Ms. Kubik to punch her in. She claimed she verbally counseled the claimant not to do this. She further alleged that she would leave early on different occasions and that she would punch Ms. Kubik out if she was doing something store related. After making this confession, she was terminated. On March 1, when the employer called in Ms. Kubik, she refused to cooperate with the investigation. The employer terminated the claimant for "time card fraud" on the same date.

REASONING AND CONCLUSIONS OF LAW:

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.

871 IAC 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 gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation.

It is not within the scope of the case for the undersigned to determine whether the employer was justified in terminating the claimant or whether it had good cause. The only standard before the agency is whether the employer has proven misconduct by a preponderance of evidence.

This is a close case. The employer has certainly proven that it took reasonable steps to investigate suspicious circumstances. In the final analysis, however, the employer has not presented the quality of evidence which is required to establish misconduct. The claimant's

supervisor admitted wrongdoing and signed a written statement which also implicated the claimant in a scheme. The written statement, however, raises more questions than it answers and it is not reliable in proving, by a preponderance of evidence, that the claimant was involved in an intentional scheme to defraud the employer. It is weak and confusing hearsay evidence at best. Essentially, the claimant's supervisor alleged that, without asking, the claimant punched her in to work when she was not working and then counseled her not to do this. On its face, this story is hard to believe.

The primary reason the case is found to be "close" is due to the fact that the claimant refused to cooperate with the investigation. An employer has a right to expect its employees to answer questions and otherwise assist in the resolution of reasonable work-related investigations. This employer attempted to conduct an investigation of a suspicious circumstance and the claimant resisted the investigation. The employer, however, did not terminate the claimant for refusing to cooperate with the investigation. It terminated her for time card fraud and time card fraud has not been proven.

The administrative law judge holds that claimant was not discharged for a proven act of misconduct and, as such, is qualified for the receipt of unemployment insurance benefits.

DECISION:

The fact-finding decision dated April 3, 2012, reference 01, is reversed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

Joseph L. Walsh
Administrative Law Judge

Decision Dated and Mailed

jlw/pjs