

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

XENOS S MARTINIE
Claimant

APPEAL NO. 10A-UI-02413-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 01-24-10
Claimant: Respondent (2R)

Iowa Code § 96.5(2)a – Discharge/Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the February 11, 2010, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on March 31, 2010. The claimant did not participate. The employer did participate through Tim Flaherty, Store Director, Chris Anderson, Manager of Chinese Express and Jeff Kelso, Assistant Manager and represented by Tim Speir, of Unemployment Insurance Services.

ISSUE:

Was the claimant discharged due to job related misconduct?

Has the claimant been overpaid any unemployment insurance benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a cook in the Chinese restaurant inside the Hy-Vee Store part time beginning May 4, 2009 through January 24, 2010 when he was discharged.

The claimant was discharged for failing to complete all of his job duties and lying to the employer about having done so. On January 21 the claimant asked to leave early because he was ill. Before he left the employer asked him if all of the closing duties had been completed. The employer was not asking the claimant to complete the duties, but merely to report what still needed to be done so that the employer could make sure that all cleaning and sanitation duties were completed. The claimant reported to Mr. Kelso that he had completed all of the duties except the sweeping and the mopping. Mr. Kelso found another employee to finish sweeping and mopping. When Chris Anderson arrived the next morning to open the restaurant he found the claimant had not completed all of the cleaning duties that he told Mr. Kelso he had done. The hot case was not clean, there was still old food in the woks, and the preparation work for the next day had not been completed. The claimant had a list of duties he was to complete and had on prior occasions completed all of the duties so he did know what to do and what was expected of him. The claimant had been previously disciplined on August 30, 2009 for failing to

complete his job duties. At that time he was warned about the necessity to complete his required work duties. The employer is subject to inspection by the state Department of Health and the claimant's failure to complete cleaning duties or to honestly and completely report what had not been completed, subjected the employer to possible citations and fines from the state. Additionally, the dirty conditions could have made a customer sick.

The claimant has received unemployment benefits since filing a claim with an effective date of January 24, 2010.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related 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.

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.

The claimant was obligated to honestly report to the employer what duties he had completed so the employer could make arrangements to have another employee complete those job duties in order to insure compliance with state health codes and to insure customer safety. The claimant had been previously disciplined for failing to complete his job duties and knew or should have known that dishonestly with the employer was conduct not in the employer's best interest. The claimant's failure to report honestly what needed to be completed in light of his previous discipline for similar conduct constitutes disqualifying misconduct. Benefits are denied.

The administrative law judge concludes claimant has been overpaid benefits for the period in question.

Iowa Code § 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code § 96.3(7). In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining whether the overpayment should be recovered under Iowa Code § 96.3(7)b is remanded to the Agency.

DECISION:

The February 11, 2010 (reference 01) representative's decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as 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 \$1,017.00.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/pjs