

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI	
<b>JAYNE L SHERRY</b> Claimant	<b>APPEAL NO. 08A-UI-06342-HT</b>
<b>HY-VEE INC</b> Employer	<b>ADMINISTRATIVE LAW JUDGE DECISION</b>
	<b>OC: 06/08/08 R: 04</b> <b>Claimant: Respondent (2-R)</b>

Section 96.5(2)a – Discharge

**STATEMENT OF THE CASE:**

The employer, Hy-Vee, filed an appeal from a decision dated July 2, 2008, reference 01. The decision allowed benefits to the claimant, Jayne Sherry. After due notice was issued a hearing was held by telephone conference call on July 24, 2008. The claimant participated on her own behalf. The employer participated by Manager of Perishables Jason Lester and was represented by Unemployment Insurance Services in the person of Tim Speir.

**ISSUE:**

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

**FINDINGS OF FACT:**

Jayne Sherry was employed by Hy-Vee from October 20, 2003 until March 27, 2008 as a full-time grocery cashier. The claimant had a record of being frequently tardy. In late 2007 her supervisor spoke with her and said although her tardiness was usually only a “few minutes” the employer did expect her to arrive on time for her shift.

Since January 27, 2008, the claimant was absent 13 times and tardy 19 times. The absences were not counted against her as they were due to illness and properly reported. However, the absences were counted even though they were only two to five minutes after her scheduled start time. On March 19, 2008, she was one hour late to work because she had misread the schedule. At that time the employer began the process to discharge her for a final incident of absenteeism. No action was able to be taken because Ms. Sherry was absent due to illness on March 20, 21, and 22, 2008. Her next scheduled work day was March 25, 2008, and she was sent home before the end of her shift and was notified she could not return to work until she spoke with Store Director Scott James about her employment status.

Ms. Sherry did meet with Mr. James on March 27, 2008, at which time he notified her she was discharged for excessive absenteeism. She has received unemployment benefits since filing a claim with an effective date of June 8, 2008.

## 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(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The claimant had been advised her job was in jeopardy as a result of her chronic tardiness. She did not take the necessary steps to assure she would arrive at work on time and the pattern continued until she had accumulated 19 tardies in less than two months. The final incident of tardiness was one hour due to her not reading the schedule and arriving late. This is a matter of purely personal consideration which is not excused. See Harlan v. IDJS, 350 N.W.2d 192 (Iowa 1984). The claimant was discharged for excessive unexcused absenteeism. Under the provisions of the above Administrative Code section, this is misconduct for which the claimant is disqualified.

Iowa Code section 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.

The claimant has received unemployment benefits to which she is not entitled. The question of whether the claimant must repay these benefits is remanded to the UIS division.

**DECISION:**

The representative's decision of July 2, 2008, reference 01, is reversed. Jayne Sherry is disqualified and benefits are withheld until she has earned ten times her weekly benefit amount, provided she is otherwise eligible.

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Bonny G. Hendricksmeier  
Administrative Law Judge

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Decision Dated and Mailed

bgh/pjs