

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ANDREW J JOHNSON
Claimant

APPEAL NO: 14A-UI-06569-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 05/18/14
Claimant: Respondent (2)

Section 96.5-2-a – Discharge
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

Hy-Vee, Inc. (employer) appealed a representative's June 20, 2014 (reference 02) decision that concluded Andrew J. Johnson (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on July 17, 2014. A review of the Appeals Section's conference call system indicates that the claimant failed to respond to the hearing notice and provide a telephone number at which he could be reached for the hearing and did not participate in the hearing. James Tranfaglia, of Corporate Cost Control, appeared on the employer's behalf and presented testimony from two witnesses, Bryce Peterson and Andy Ridler. During the hearing, Employer's Exhibit One was entered into evidence. Based on the evidence, the arguments of the employer, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant discharged for work-connected misconduct?

Was the claimant overpaid unemployment insurance benefits, and if so, is that overpayment subject to recovery based upon whether the employer participated in the fact-finding interview?

OUTCOME:

Reversed. Benefits denied. Overpaid benefits subject to recovery.

FINDINGS OF FACT:

The claimant started working for the employer on April 16, 2013. He worked part time (20-25 hours per week) in the dairy department at the employer's Cedar Rapids, Iowa store. His last day of work was October 30, 2013. The employer discharged him on or about November 2, 2013. The stated reason for the discharge was shoplifting from the store.

The claimant was in the store off-duty on November 2. He was observed by Ridler, assistant manager, attempting to conceal an item under his jacket. Ridler also saw empty packaging for a frying pan. Ridler summoned the off-duty police officer who was stationed at the store.

When confronted by the police officer, the claimant admitted that he had taken a frying pan. He was then arrested and taken away from the store. The employer determined to end the claimant's employment due to this attempted theft.

The claimant established a claim for unemployment insurance benefits effective May 18, 2014. A fact-finding interview was held with a Claims representative on June 19, 2014. The employer, through a Human Resources representative, participated directly in the fact-finding interview. While the claimant had some other employment after October 30, 2013, Agency records indicate that those records are insufficient for the claimant to have requalified after the separation from this employer. The claimant has received unemployment insurance benefits after the separation in the amount of \$116.00.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982); Iowa Code § 96.5-2-a.

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. Rule 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. Rule 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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. Rule 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

Under the definition of misconduct for purposes of unemployment benefit disqualification, the conduct in question must be "work connected." *Diggs v. Employment Appeal Board*, 478 N.W.2d 432 (Iowa App. 1991). However, the court has concluded that some off duty conduct can have the requisite element of work connection. *Kleidosty v. Employment Appeal Board*, 482 N.W.2d 416, 418 (Iowa 1992). Under similar definitions of misconduct, it has been found:

In order for an employer to show that its employee's off-duty activities rise to the level of misconduct in connection with the employment, the employer must show by a preponderance of the evidence:

[T]hat the employee's conduct (1) had some nexus with her work; (2) resulted in some harm to the employer's interest, and (3) was in fact conduct which was (a) violative of some code of behavior impliedly contracted between employer and employee, and (b) done with intent or knowledge that the employer's interest would suffer.

Dray v. Director, 930 S.W.2d 390 (Ark. App 1996); *In re Kotrba*, 418 N.W.2d 313 (SD 1988), quoting *Nelson v. Department of Employment Security*, 655 P.2d 242 (WA 1982); 76 Am. Jur. 2d, Unemployment Compensation §§77–78. Here, while the conduct was “off-duty,” it was still on the employer’s premises, creating the nexus with the work. Theft of the employer’s property, even off-duty, is harmful to the employer’s interest and contrary to the behavior expected by the employer of its employees. It was “work-connected” conduct.

The claimant's attempted theft of the frying pan shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. The employer discharged the claimant for reasons amounting to work-connected misconduct.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer’s account will be charged for the overpaid benefits. Iowa Code § 96.3-7-a,--b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits. Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

DECISION:

The representative’s June 20, 2014 (reference 02) decision is reversed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of November 2, 2013. This disqualification continues until the claimant has been paid ten times his weekly benefit amount for insured work, provided he is otherwise eligible. The employer’s account is not subject to charge. The claimant is overpaid \$116.00, which is subject to recovery.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

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