

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

STEPHEN DYE
Claimant

APPEAL NO. 11A-UI-10635-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 07-10-11
Claimant: Respondent (2-R)

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the August 4, 2011, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on September 6, 2011. The claimant provided a phone number prior to the hearing but was not available at that number when called for the hearing and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. Karla Heffron, assistant vice-president of warehousing; Todd Hockenson, vice-president of distribution; and Paula Mack, employer representative, participated in the hearing on behalf of the employer. Employer's Exhibits 1 through 13 were admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time assistant department manager in the grocery warehouse for Hy-Vee from September 14, 2006 to June 27, 2011.

On January 6, 2011, the employer held the claimant's annual performance review and spoke to him about his tardiness at that time. On January 14, 2011, the claimant was tardy and the employer met with him about his attendance (Employer's Exhibit Two). On February 10, 2011, he received a documented verbal warning about his attendance (Employer's Exhibit Three). On April 15, 2011, the claimant received a written warning letter for his attendance (Employer's Exhibit Four). On May 6, 2011, the employer met with the claimant about his attendance, repeated violation of the cell phone policy, and professionalism in working with employees he supervised after it was reported he was mimicking an employee with a disability (Employer's Exhibit Six). He received a written warning and three day suspension at that time because he had accumulated 12.5 attendance points, and the employer generally terminates employment when an employee reaches 12 attendance points.

On May 18, 2011, the claimant called the employer in the middle of the night and reported he was involved in a motorcycle accident. He called in again at 12:30 p.m. May 18, 2011, to state he was in a motorcycle accident but indicated he had not sought medical attention yet and the employer explained he would need to bring medical documentation to cover his absences May 18 and May 19, 2011. The claimant called the employer May 20, 2011, and stated he could return to work May 21, 2011, and the employer told him that his physician needed to provide medical leave of absence information. The claimant stated he would bring the required medical information in May 21, 2011. The claimant went to the employer's office May 21, 2011, with a doctor's excuse dated May 20, 2011, but it did not cover May 18 or May 19, 2011, and did not say the claimant had received a full release to return to work (Employer's Exhibit Eleven). The employer told the claimant he needed to have his doctor provide additional medical documentation to substantiate his leave. The employer also had the claimant sign the May 6, 2011, meeting letter regarding his attendance, cell phone usage, and professionalism at work. The claimant worked for two hours May 21, 2011, before being sent home because he did not have a full release to return to work and was told to bring a note prior to his next scheduled shift May 25, 2011. The claimant provided another doctor's note dated May 25, 2011, that excused him from work until June 1, 2011 (Employer's Exhibit Twelve). He did not have a doctor's excuse covering May 18 or 19, 2011.

On May 27, 2011, the employer met with the claimant and asked what was causing his tardiness and his fairly recent problems at work and what the employer could do to help him (Employer's Exhibit Seven). The claimant explained he had been in prison for 11 years and was "having trouble dealing with reality" (Employer's Exhibit Seven). He stated he was experiencing some personal problems and suffering from depression and anxiety (Employer's Exhibit Seven). The employer suggested the claimant take advantage of its Employee Assistance Program (EAP) and brought in a human resources representative to discuss that matter with him (Employer's Exhibit Seven). The employer told him he needed to attend any appointments scheduled by EAP and comply with any recommendations it made and the claimant agreed to do so (Employer's Exhibit Seven). He received a doctor's note excusing him from work for two to four weeks while he went through the EAP process (Employer's Exhibit Thirteen). The claimant attended his first two appointments with EAP scheduled June 1 and June 8, 2011, but was a no-call, no-show for his June 14, 2011, appointment. On June 15, 2011, the employer's human resources department sent the claimant a certified letter explaining he missed his June 14, 2011, appointment and the employer was in the process of deciding whether to continue to pay for the claimant to attend the program and that it was a condition of his employment (Employer's Exhibit Eight). The letter also stated the claimant needed to contact the employer by June 21, 2011, to discuss the situation (Employer's Exhibit Eight). The claimant called EAP and rescheduled his appointment for June 22, 2011, but failed to call or show up for that appointment. On June 27, 2011, EAP sent the employer a letter showing the claimant's attendance record with the program and stating no further contact was planned (Employer's Exhibit Nine). On June 27, 2011, the claimant called the employer and asked if he still had a job and was notified his employment was terminated for failing to follow through with EAP as a condition of his continued employment. The claimant asked the employer if she knew what an addict was. The employer sent the claimant a certified letter confirming his termination June 27, 2011 (Employer's Exhibit Ten).

The claimant has claimed and received unemployment insurance benefits since his separation from this employer.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job misconduct.

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.

The employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant's attendance and behavior declined over the last few months of his employment. He was consistently violating the attendance policy, as well as the cell phone policy, and the employer was concerned about his well-being because he had been a good employee during his tenure with the employer. It met with him to discuss the situation and the claimant explained he was experiencing personal problems related to being in prison and a housing deal with his family in addition to battling an addiction. The employer offered help through its employee assistance program and the claimant accepted the offer and did attend two sessions before failing to return. Because of the claimant's attendance problems and deteriorating performance, the employer made participation in the EAP a condition of the claimant's employment and he did not follow through with the requirements of the program. While the claimant was experiencing several problems and the administrative law judge in not unsympathetic to the claimant's situation, under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and

obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits must be denied.

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 section 96.3-7. In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

DECISION:

The August 4, 2011, reference 01, 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 has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/kjw