IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

IVORY L GAMBLE
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CEDAR RAPIDS IA 52402

HY-VEE INC
C/O TALX UCM SERVICES INC
PO BOX 283
ST LOUIS MO 63166-0283

HY-VEE INC
C/O TALX UCM SERVICES INC
3799 VILLAGE RUN DR #511
DES MOINES IA 50317

Appeal Number: 05A-UI-11992-RT
OC: 10-30-05 R: 03
Claimant: Appellant (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant, Ivory L. Gamble, filed a timely appeal from an unemployment insurance decision dated November 17, 2005, reference 01, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held on December 12, 2005, with the claimant participating. Gary McClure, Store Director at one of the employer's stores in Cedar Rapids, Iowa, where the claimant was employed, and Genevieve Rossman, Kitchen Clerk, participated in the hearing for the employer, Hy-Vee, Inc. The employer was represented by David Williams of TALX UCM Services, Inc. Jean Rossman was available to testify for the employer but not called because her testimony would have been repetitive and unnecessary. Employer's Exhibits One and Two were admitted into evidence. The administrative law judge

takes official notice of Iowa Workforce Development Department of unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including employer's Exhibit One and Two the administrative law judge finds: The claimant was employed by the employer, most recently as a full time kitchen department clerk, from May 5, 2000 until he was discharged on November 1, 2005. The claimant was discharged for failing to follow store policy and not treating customers appropriately and not following an agreement he had made with the employer on March 7, 2005, all emanating from an incident on October 31, 2005. On that day, October 31, 2005, a customer came up to the lunch counter. He was looking at the various items to purchase to eat. Genevieve Rossman, Kitchen Clerk, was behind the counter a couple of feet from the customer and asked the customer if he was ready to order. The customer indicated that he was still looking. Ms. Rossman then went on about her other work. The claimant then saw the customer and asked the customer in a sarcastic tone "are you going to stand there or do you want something." The customer was frustrated. The customer ordered a tenderloin sandwich. The claimant then asked an appropriate question as to whether the customer wanted his sandwich on white or wheat bread. The customer ordered white bread. The claimant kept repeating wheat bread and the customer kept responding no, white bread. The claimant then laughed. The customer then proffered a $20.00 bill to pay for the food. The claimant said out of $10.00. The customer tried to correct the claimant stating that it was a $20.00 bill but the claimant kept repeating out of $10.00. This upset the customer so that after he had made his purchase he sought out the assistant manager and wrote out a complaint about the claimant as shown at Employer's Exhibit Two. The first part of the conversation between the customer and the claimant was observed by Ms. Rossman.

On February 27, 2005, the claimant had deliberately put the wrong price on an item to play a joke on a customer. However, the customer did not think it was funny. The customer filed a complaint. The claimant was given a written consultation for this on February 28, 2005 and suspended for one week. When the claimant returned he signed an agreement that appears at Employer's Exhibit One agreeing to conduct himself in a professional manner with both customers and other employees and not let his mouth get him in trouble with customers and employees and not play any jokes of any kind on customers. This agreement was established not only because of the incident on February 27, 2005 but also because of other customer complaints resulting in a written warning on February 17, 2005 and another consultation on February 20, 2005. The claimant had worked for the employer for five years and did the best he could. The claimant was aware before October 31, 2005, that the employer was concerned about the claimant's joking with customers and that the employer did not like the claimant to do so.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from employment was a disqualifying event. It was.

The parties agree, and the administrative law judge concludes, that the claimant was discharged on November 1, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. The administrative law judge concludes that the employer has met its

burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer's witnesses credibly testified to an incident on October 31, 2005 in which the claimant continued to be sarcastic and/or joke inappropriately with a customer. The customer was standing by the food counter making up his mind what choices he was going to make when the claimant asked him whether he was going to stand there or did he want to order something. The claimant was sarcastic. The customer became frustrated and made an order. The claimant then asked appropriately if the customer wanted white or wheat bread. The customer ordered white bread, but the claimant kept saying wheat bread. The customer kept responding no, white bread. The claimant then laughed. The customer then attempted to pay for the food with a $20.00 bill but the claimant said out of $10.00. The customer kept correcting the claimant pointing out it was a $20.00 bill and the claimant kept repeating it was out of a $10.00 bill. The customer then filed a complaint as shown at Employer's Exhibit Two. The claimant's testimony to the contrary is not credible. The claimant testified that none of this incident occurred but he seemed to equivocate in his testimony by stating at some point that he did not remember or he did not recall. However, Genevieve Rossman, Kitchen Clerk, corroborated the claimant's initial statements to the customer and Ms. Rossman's testimony combined with the customer's written statement was sufficiently credible to overcome the claimant's equivocal denial. The administrative law judge concludes that the claimant did say the things that he is accused of saying and that these were inappropriate and further violated an agreement between the claimant and the employer on March 7, 2005 as shown at Employer's Exhibit One.

The claimant had been the subject of customer complaints when the claimant was attempting to joke with customers but the customers did not see the joke. The claimant conceded that on February 27, 2005 he tried to "play" with a customer by putting the wrong price on an item. The claimant testified he was joking but the customer did not think so and complained. Arising out of this was a written consultation dated February 28, 2005, a one-week suspension, and the agreement as shown at Employer's Exhibit One. The claimant had also been the subject of prior customer complaints which caused a consultation on February 20, 2004 and a written warning on February 17, 2005 which also resulted in the agreement as shown at Employer's Exhibit One.

In summary, and for all of the reasons set out above, the administrative law judge concludes that the claimant was inappropriate and rude repeatedly to a customer on October 31, 2005 which, because of the agreement at Employer's Exhibit One and because of the warnings, are deliberate acts constituting a material breach of his duties and obligations arising out of his worker's contract of employment and evince a willful and wanton disregard of the employer's interest and are, at the very least, carelessness or negligence in such a degree of recurrence all as to establish disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he requalifies for such benefits.

DECISION:

The representative's decision of November 17, 2005, reference 01, is affirmed. The claimant, Ivory L. Gamble, is not entitled to receive unemployment insurance benefits, until or unless he requalifies for such benefits, because he was discharged for disqualifying misconduct.

kkf/kjf