

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DENNIS NAGY**  
Claimant

**APPEAL NO: 11A-UI-13140-ET**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**HY-VEE INC**  
Employer

**OC: 09-04-11**  
**Claimant: Respondent (1)**

Section 96.5-2-a – Discharge/Misconduct

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the September 28, 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 January 13, 2012. The claimant participated in the hearing with Attorney Joseph Ferrentino. Leah Hefel, Human Resources Manager; Rob Biggins, Manager of Store Operations; Deb Clemens, Wine and Spirits Manager; and Aaron Heyer, Employer Representative, participated in the hearing on behalf of the employer. Employer's Exhibits One through Four 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 wine and spirits manager for Hy-Vee from October 16, 2007 to August 10, 2011. On May 18, 2009, the claimant received a written warning after excessive customer complaints about the claimant's customer service skills such as not waiting on customers promptly, not showing any sense of urgency and not being visible to customers (Employer's Exhibit One). The warning stated the claimant needed to smile and greet all customers and "when at the computer get up immediately to assist customers. When alone in the department maintain eye contact with the register. Customer service is the most important job! Take customer to merchandise" (Employer's Exhibit One). Under "Additional Comments" the employer wrote that "any additional complaints will result in suspension and/or job termination" (Employer's Exhibit One). The claimant signed the warning (Employer's Exhibit One). On April 6, 2011, the claimant received a final written warning after sending a customer on crutches with more than 15 items to the regular checkout lanes (Employer's Exhibit Two). The warning indicated the employer had spoken to the claimant about customer service issues several times during the last two years (Employer's Exhibit Two). The warning further stated that the claimant "will treat all customers with respect. He will follow all Hy-Vee policies including our policies on friendliness, greeting, thanking, assisting and "wowing" every customer that he comes in contact with. Any further complaints about rudeness, not greeting, not

thanking or assisting our customers will result in termination with Hy-Vee" (Employer's Exhibit Two). On August 3, 2011, a secret shopper hired by Hy-Vee reported the claimant did not smile or greet her and also stated the claimant was behind the counter reading the paper and the employer decided to terminate the claimant's employment August 10, 2011. Employees are required to smile at and greet customers within ten feet of them. The claimant stated that it was possible he did not smile at or greet the secret shopper when she was within ten feet of him but denies reading the paper recreationally as he was required to check other stores' advertisements and that was the only time he read the paper at work. During the afternoon of August 3, 2011, the claimant was performing his job duties, stocking shelves, receiving deliveries, balancing invoices and checking in vendors. The claimant always attempted to be friendly and attentive to customers and respond quickly and appropriately. The claimant stated that with regard to Employer's Exhibit One a customer complained because he wanted the sale price after the sale ended and was upset when the claimant could not give it to him. Concerning the customer on crutches the claimant stated he did not notice the customer was on crutches until he started toward the regular checkout lane at which time he tried to catch him to have him come back to his register but he was too far away. The claimant indicated he tried to follow the employer's customer service policies and performed the job to the best of his ability at all times.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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 employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000). While the claimant may have failed to comply 100 percent with smiling at and greeting customers, he persuasively argued that he did so to the best of his ability. He may not have helped customers as promptly as expected but usually that was because he was performing other tasks and could not always see the customer. He effectively explained the circumstances surrounding the first and second written warnings and denied reading the newspaper recreationally August 3, 2011. Although some customers complained about the claimant's customer service skills, the administrative law judge must conclude that the claimant's actions do not rise to the level of disqualifying job misconduct as that term is defined by Iowa law. Therefore, benefits are allowed.

**DECISION:**

The September 28, 2011, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Julie Elder  
Administrative Law Judge

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Decision Dated and Mailed

je/pjs