

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JUDY R BAAS
Claimant

APPEAL NO. 17A-UI-07399-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 06/18/17
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Hy-Vee (employer) appealed a representative's July 14, 2017, decision (reference 01) that concluded Judy Baas (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for August 8, 2017. The claimant participated personally. The employer was represented by Barbara Buss, Hearings Representative, and participated by Dan Steenhoek, Store Director, and Erika Elbert, Human Resources Manager. Exhibit D-1 was received into evidence. The employer offered and Exhibit 1 was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on December 13, 2016, as a part-time kitchen clerk/grocery checker. The claimant signed for receipt of the employer's handbook and orientation information on December 13, 2016. The employer requires every employee to smile, greet, and acknowledge customers in the store.

On February 14, 2017, a customer complained about the claimant. On February 15, 2017, the employer talked to the claimant about being nicer when performing her duties. On April 27, 2017, a customer complained about two women. The employer issued the claimant a written warning on May 2, 2017, for not being friendly. The claimant asserted she was friendly. The employer notified the claimant that further infractions could result in termination from employment.

On May 19, 2017, an unknown secret shopper went through the claimant's line where she was working as a checker. The secret shopper rated the claimant in nine categories where she could earn a total of fourteen points. She received full points in seven categories or nine points. The claimant could earn three points for smiling anytime during the interaction and two points

for initiating a verbal acknowledgement immediately when starting the transaction. The secret shopper gave her negative two of three points for not giving one smile. The secret shopper gave her negative four of two points when the claimant did not greet her once. The unknown person calculated the claimant earned a total of three of fourteen points or twenty-one percent.

On May 22, 2017, the employer terminated the claimant for failure to greet a customer or smile once on May 19, 2017. The claimant denied the unknown secret shoppers report. She asserts she smiled and greeted all customers.

The claimant filed for unemployment insurance benefits with an effective date of June 18, 2017. The employer participated personally at the fact finding interview on July 12, 2017, by Erika Elbert.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. *Crosser v. Iowa Department of Public Safety*, 240 N.W.2d 682 (Iowa 1976). The employer may have had the power to present testimony from the secret shopper but it did not. All of the employer's information about the claimant's behavior comes from a third party source. Secret shoppers and customers were not present to testify at the hearing. If the claimant was so discourteous to customers, a co-worker or a member of management should have seen her behavior and been able to testify to it at a hearing. The employer did not provide first-hand testimony at the hearing and, therefore, did not provide sufficient eye witness evidence of job-related misconduct to rebut the claimant's denial of said conduct. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's July 14, 2017, decision (reference 01) is affirmed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/rvs