

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BONITA J SIMONS LOVEDY
Claimant

APPEAL NO. 09A-UI-17608-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 10/25/09
Claimant: Appellant (1)

Section 96.5-2-a – Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated November 17, 2009, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on January 4, 2010. Claimant participated. Employer participated by Randy Menke, store director, and Tressa Graham, manager of store operations. The employer was represented by Tim Speir. The record consists of the testimony of Randy Menke; the testimony of Tessa Graham; the testimony of Bonita Simons Lovedy; and claimant's exhibit A.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The claimant worked as a salad bar clerk in the Hy-Vee store in Fairfield, Iowa. She was hired on October 12, 2004.

The incident that led to the claimant's termination occurred on October 21, 2009. Tressa Graham was using the ladies room and the claimant came in. Ms. Graham had opened the door and let it close and she heard two clicks from a lighter. Ms. Graham left the restroom and called Randy Menke on the intercom. Ms. Graham made certain no one else entered the restroom. The claimant left the restroom and went back to work. Mr. Menke and Ms. Graham then went in the restroom and smelled marijuana. The claimant was then asked to go to Mr. Menke's office. Ms. Graham was also present.

Mr. Menke asked the claimant if she had been smoking marijuana in the restroom and at first she denied it. Mr. Menke could smell marijuana on the claimant when she was in his office. Mr. Menke offered to let the claimant take a drug test and she refused. She then admitted that she had smoked something she called a "quick hitter." The employer has a policy that prohibits

the use of illegal substances on the premises. The claimant knew about that policy as it was contained in the employee handbook and the claimant had received a copy of the handbook on October 12, 2004. The policy calls for dismissal. The claimant was terminated on October 21, 2009.

REASONING AND CONCLUSIONS OF LAW:

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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. The employer in this case had a policy that prohibited the use of illegal drugs on its premises. Violation of that policy would lead to termination. The employer has an interest in providing a drug free workplace to insure the safety of its employees and its customers. The claimant knew the employer had this policy.

The greater weight of the evidence in this case is that the claimant was smoking marijuana on the Hy-Vee premises on October 21, 2009. Ms. Graham heard a lighter click twice; the restroom smelled like marijuana after the claimant left; the claimant smelled like marijuana; and she admitted smoking a "quick hitter" when questioned about it by Mr. Menke. The claimant denied using marijuana when she testified at the hearing. Her explanation was that the smell was due to a combination of her bowel movement and some perfume she sprayed. This testimony is not credible as both Mr. Menke and Ms. Graham smelled marijuana in the restroom

and Mr. Menke told the claimant he smelled marijuana on her person. The claimant also testified that she never admitted to smoking marijuana. Both Mr. Menke and Ms. Graham heard the claimant admit that she had done so.

The claimant breached her duty to the employer by using an illegal substance on the employer's premises. The employer has proven misconduct. Benefits are denied.

DECISION:

The decision of the representative dated November 17, 2009, reference 01, is affirmed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs