

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**PHILLIP C LOWRY**  
Claimant

**APPEAL NO. 13A-UI-11710-SWT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**HY-VEE INC**  
Employer

**OC: 09/08/13**  
**Claimant: Respondent (2)**

Section 96.5-2-a – Discharge  
Section 96.3-7 – Overpayment of Benefits

**STATEMENT OF THE CASE:**

The employer appealed an unemployment insurance decision dated October 10, 2013, reference 01, that concluded the claimant's discharge was not for work-connected misconduct. A telephone hearing was held on November 12, 2013. The parties were properly notified about the hearing. The claimant participated in the hearing. Cathy Hood participated in the hearing on behalf of the employer with witnesses, Andy Mueller, Trevor Fletcher, and Joyce Marley. Exhibits One through Three and A were admitted into evidence at the hearing.

**ISSUES:**

Was the claimant discharged for work-connected misconduct?

Was the claimant overpaid unemployment insurance benefits?

Is the employer subject to charge for benefits paid to the claimant?

**FINDINGS OF FACT:**

The claimant worked for the employer from November 1987 to August 16, 2013. When his employment ended, he was an assistant manager. He was informed and understood that under the employer's work rules, harassment of employee was prohibited.

In August 2013, the claimant approached a female employee on several occasions and commented that she was pretty. The employee told the claimant to stop and that she was uncomfortable with his comments and thought they were inappropriate. Even after she told him to stop, the claimant took the employee's personal calculator and wrote, "You're pretty" on the calculator. The employee was concerned about the claimant's conduct toward her and reported it to management.

The store manager also found the claimant had not carried out his duties as assistant manager on August 7, 2013, because he did not make sure the garbage and recycling bins were not emptied, the backroom was not swept and straightened, and the shelves were not faced. The

store manager also had concerns about the claimant reporting to work unshaven and standing around rather than working.

The employer discharged the claimant for the reasons set forth above on August 16, 2013.

The claimant filed for and received a total of \$2,241.00 in unemployment insurance benefits for the weeks between September 8 and November 9, 2013.

The employer had a manager who participated in the fact-finding interview and presented information about the reasons for the separation from employment.

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

The issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

The unemployment insurance law disqualifies claimants discharged for work-connected misconduct. Iowa Code § 96.5-2-a. The rules define misconduct as (1) deliberate acts or omissions by a worker that materially breach the duties and obligations arising out of the contract of employment, (2) deliberate violations or disregard of standards of behavior that the employer has the right to expect of employees, or (3) carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design. 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 misconduct within the meaning of the statute. 871 IAC 24.32(1).

I cannot consider the work performance issues raised by the employer to amount to disqualifying misconduct. The evidence shows unsatisfactory work performance. The claimant, however, made unwanted comments to a female employee. She told the claimant she was uncomfortable with his comments, yet he wrote the same comment the employee complained about on her personal property. The fact that the claimant did not intend the comments as sexual advances is beside the point. It was unprofessional conduct for a manager. Work-connected misconduct has been shown in this case.

The unemployment insurance law generally requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. But a claimant is not required to repay an overpayment when an initial decision to award benefits on an employment-separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3-7-a, -b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid \$2,241.00 in benefits.

Because the employer participated in the finding interview, the claimant is required to repay the overpayment and the employer's account is not subject to charge for the overpaid benefits.

**DECISION:**

The unemployment insurance decision dated October 10, 2013, reference 01, is reversed. The claimant is disqualified from receiving unemployment insurance benefits until he has been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant was overpaid \$2,241.00 in benefits, the claimant is required to repay the overpayment and the employer's account is not subject to charge for the overpaid benefits.

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Steven A. Wise  
Administrative Law Judge

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Decision Dated and Mailed

saw/css