

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

AMPHAI S PEARL
Claimant

APPEAL NO: 11A-UI-04167-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 12/05/10

Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Hy-Vee, Inc. (employer) appealed a representative's March 22, 2011 decision (reference 01) that concluded Amphai S. Pearl (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 26, 2011. The claimant participated in the hearing. Paula Mack of Corporate Cost Control, Inc. appeared on the employer's behalf and presented testimony from one witness, Rod Burns. One other witness, Bill Novotny, was available on behalf of the employer but did not testify. During the hearing, Employer's Exhibits One and Two were entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on June 4, 2008. She worked full time as a reserve pharmacist at the employer's Des Moines, Iowa store. Her last day of work was December 3, 2010. The employer discharged her on December 9, 2010. The reason asserted for the discharge was an attendance issue.

On December 6 the claimant was scheduled to work from 1:00 p.m. to 9:00 p.m.; on December 7 she was scheduled to work from 9:00 a.m. to 5:00 p.m. On the morning of December 6 the claimant was stopped on the side of a road with a flat tire when a police officer stopped to assist her. As part of procedure he ran her license and found that there was an outstanding warrant for her arrest going back to 2009. He took her into custody, but first allowed her to make a phone call; she called the employer at about 10:00 a.m. and told her manager that she would not be able to work her shift that day. She did not provide any specific reason for why she would be absent, as at that time she was not sure what was going on.

She did not have an opportunity to see a judge until the morning of December 7. Prior to booking she had told a friend that if she was kept overnight that he should call the employer to advise she would not be at work that day as well; the friend may have called, but did not speak to a manager. The claimant was released from custody early afternoon of December 7 and called the employer at about 4:00 p.m. to indicate she could return to work the next day; she was told not to come the next day, but to come in early on December 9. She did report on December 9 and explained the situation for her absences.

The claimant had been cited for an OWI violation in 2008 and had been placed on probation. She had completed all of the necessary classes and other requirements of her probation, but she had not had a final meeting with her probation officer so that the probation officer could formally release her from probation; there may have been a notice sent to the claimant about an appointment for a meeting with the probation office, but due to some address changes the claimant did not receive that notice. The probation violation warrant was issued because she did not have her final meeting with the probation office. After her arrest on December 6, the claimant had a hearing with a judge in January 2011 who formally released her from probation and dismissed the probation violation charge.

The claimant had received a written warning on January 23, 2009, and a final warning on January 26, 2009, both due to attendance issues, primarily due to punctuality concerns. The claimant had not had any further unexcused incidents between January 26, 2009 and December 6, 2010. However, as the employer viewed December 6 and December 7 as further unexcused incidents after a final warning, it determined to discharge the claimant.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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. 871 IAC 24.32(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

Absenteeism can constitute misconduct; however, to be misconduct, absences must be both excessive and unexcused. 871 IAC 24.32(7); Cosper, supra; Gaborit v. Employment Appeal Board, 734 N.W.2d 554 (Iowa App. 2007). The timing between events is also a factor. Here, the claimant's final two absences would not be considered to be "excused," but they occurred almost two years after the most recent attendance related issues. The claimant did not have current excessive unexcused absences. 871 IAC 24.32(8); Greene v. Employment Appeal Board, 426 N.W.2d 659 (Iowa App. 1988). Therefore, while the employer may have had a good business reason for discharging the claimant, it has failed to meet its burden to establish misconduct. Cosper, supra. The claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's March 22, 2011 decision (reference 01) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs