

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**GEOFFREY C GANDY**  
Claimant

**APPEAL NO. 11A-UI-13346-VST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**HY-VEE INC**  
Employer

**OC: 08/28/11**  
**Claimant: Respondent (2R)**

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

**STATEMENT OF THE CASE:**

The employer filed an appeal from a decision of a representative dated September 30, 2011, reference 02, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on November 2, 2011. Employer participated by Ben Conway, store director, and Steve Loder, manager of perishable. The employer was represented by Paula Mack. The record consists of the testimony of Ben Conway; the testimony of Steve Loder; and Employer's Exhibits 1-9.

**ISSUES:**

Whether the claimant was discharged for misconduct; and  
Whether the claimant has been overpaid unemployment insurance benefits.

**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 employer is a retail grocery store chain. The claimant worked in the store located in Ames, Iowa. The claimant was hired on September 11, 2007, as a full-time courtesy clerk. His last day of work was September 1, 2011. He was terminated on September 1, 2011.

The incident that led to the claimant's termination occurred on August 31, 2011. The employer uses a "secret shopping" service to monitor store performance. A secret shop was done at the Ames store on August 31, 2011, in the evening. The shopper encountered the claimant in the aisle. The claimant did not greet the shopper. When the shopper asked where an item was located, the claimant merely pointed.

Hy-Vee has a written policy, of which the claimant was aware, that all customers are to be greeted by store employees. In addition, one of the most important Hy-Vee policies is that if a customer asks where an item is located, the employee takes the customer to the item. Pointing or describing where an item is located is not permitted.

The claimant had received a written warning on June 10, 2011, concerning two instances of poor customer service. The claimant had allowed a cart to roll into a pickup truck owned by a customer. The claimant was rude to the customer. In addition, the claimant was power washing and sprayed a customer, getting the customer wet. The claimant was told that if something like this were to happen again, that he would be terminated. (Exhibit 4)

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

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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

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. An employer is entitled to establish work rules and policies and can reasonably expect that employees will follow those rules. Insubordination, which is the continued failure to follow reasonable instructions, constitutes misconduct. See *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990) The employer has the burden of proof to show misconduct.

The evidence in this case established that the claimant violated one of the most fundamental rules of the employer. On August 31, 2011, he failed to greet a customer and did not show the customer where an item was located by taking the customer to the item. The customer in question was actually a secret shopper that was monitoring store performance. The claimant knew that the employer considered this policy to be important and he still chose to disregard it. The claimant had previously received a written warning for two customer service incidents on June 10, 2011. He was told that any further violations would lead to termination. The claimant knew his job was in jeopardy. The administrative law judge concludes that the deliberate failure to follow store policy on August 31, 2011, was misconduct. Benefits are denied.

The next issue is overpayment of benefits.

Iowa Code § 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

The overpayment issue is remanded to the claims section for determination.

**DECISION:**

The decision of the representative dated September 30, 2011, reference 02, is reversed. 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. The overpayment issue is remanded to the claims section for determination.

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Vicki L. Seeck  
Administrative Law Judge

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Decision Dated and Mailed

vls/pjs