

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TRACY C PETERSEN
Claimant

APPEAL NO. 11A-UI-10051-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 07/03/11

Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Hy-Vee, Inc. (employer) appealed a representative's July 22, 2011 decision (reference 01) that concluded Tracy C. Petersen (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 August 23, 2011. The claimant participated in the hearing. Alice Rose Thatch of Corporate Cost Control, Inc. appeared on the employer's behalf and presented testimony from one witness, Josh Asche. 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 13, 1997. She worked full-time as a staff pharmacist at the employer's Urbandale, Iowa store. Her last day of work was May 23, 2011. The employer discharged her on May 31, 2011. The reason asserted for the discharge was that the employer could no longer employ the claimant, as the claimant was ineligible to receive monies derived from Medicaid or Medicare funds.

The claimant's pharmacist's license had been suspended in approximately 1990 due to some substance abuse issues that the claimant had self-reported to the pharmacy licensing board. Her license was reinstated after eight months, subject to a five-year probation, which she successfully completed. In February 1991 the claimant was added to a list of "excluded providers" who could not receive monies derived from Medicaid or Medicare funds. The claimant received a notice saying she was not eligible to receive funds from Medicaid or Medicare, but did not fully understand what this might mean for her as far as potential employment; she did not understand she was on a list of "excluded providers," and the notification to her did not indicate she was banned from working for any employer which depended on Medicaid or Medicare funds, and did not impose a duty on her to inform the employer that she was on any list of excluded providers. She had reasonably believed from the

reading of the letter she received that she would only be on the list until her license was reinstated, which was well in advance of her employment with the employer.

When the employer hired the claimant in June of 1997, she made the employer aware of her prior licensing issues. There was no discussion between the claimant and the employer regarding being on any "excluded provider" list. The claimant did not provide any false information regarding her background.

In May 2011 the employer learned from the Office of the Inspector General (OIG) that the claimant could not receive payment from funds derived from Medicaid or Medicare sources. Up to 90 percent of the employer's pharmacy revenue comes from these sources. As a result, it determined it could no longer employ the claimant, and discharged her.

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 that 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 that 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).

The reason cited by the employer for discharging the claimant is the fact that it could not pay her from the primary source of its funding due to the claimant's placement on the excluded provider list in 1991. The sole reason the employer was forced to discharge the claimant was because the claimant was ineligible to be paid from the primary source of the employer's funds. Where an individual's restrictions have been self-inflicted and the individual had reason to know that her actions could jeopardize her ability to work and that she was therefore were putting her job in jeopardy, the loss eligibility to work can be found to be intentional and therefore disqualifying misconduct. Cook v. Iowa Department of Job Service, 299 N.W.2d 698 (Iowa 1980). Misconduct connotes volition. Huntoon, supra. However, where a loss of an ability to

work results in loss of an individual's employment, the discharge is not for disqualifying misconduct unless there is a showing that the individual both knew that her job was in jeopardy and that she subsequently and intentionally committed infractions that led to the loss of the license. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395 (Iowa App. 1989).

In this case, there is no evidence the claimant intentionally acted in such a way as to jeopardize her ability to work by deliberately and providing substantially false information during her application for employment. There is no current act of misconduct as required to establish work-connected misconduct. 871 IAC 24.32(8); Greene v. Employment Appeal Board, 426 N.W.2d 659 (Iowa App. 1988). The incidents in question occurred well in advance of even the employer's hiring of the claimant. Although the administrative law judge can sympathize with the employer's situation insofar as being required to follow the directives of the regulatory agency to not allow the claimant to continue her employment, the employer has not provided any evidence the claimant is guilty of intentional acts leading to the loss of her ability to work for the employer. Rather, it appears more that it was the employer who is barred from employing the claimant unless it could pay her from non Medicaid or Medicare funds; it was more the employer's duty to verify whether the claimant was on that list prior to employing the claimant than it was the claimant's duty to ensure she was not seeking employment from an employer who might be paying her with funds derived from Medicaid or Medicare funds.

The employer has not met its burden to show disqualifying misconduct on the part of the claimant as defined by law. Cosper, supra. Based upon the evidence provided, 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 July 22, 2011 decision (reference 01) is reversed. 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/kjw