

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JEFFREY M WALDNER
Claimant

APPEAL NO. 12A-UI-14278-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 11/04/12
Claimant: Respondent (2R)

Iowa Code § 96.5(2)a – Discharge/Misconduct
Iowa Code § 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the November 27, 2012, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on February 14, 2013. The claimant did participate. The employer did participate through Gary McCormick, Store Director and Bill Darrah, Pharmacy Manager and was represented by Ajah Anderson, of Corporate Cost Control. Employer's Exhibit One was entered and received into the record.

ISSUES:

Was the claimant discharged due to job-connected misconduct?

Has the claimant been overpaid any unemployment insurance benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed at Hy-Vee, Inc. as a staff pharmacist full time beginning on April 18, 2003 through November 1, 2012 when he was discharged. The claimant had a long history of discipline for mistreatment of subordinates and customers. (See Employer's Exhibit One) He had been moved from the pharmacy manager position to a staff pharmacist position in late 2012. On October 18 the claimant was given a written list of duties expected of him which included that he was expected to perform the "return to stock" task during any Saturday shifts he worked. The pharmacists rotated Saturday shifts and each of them were expected to complete the same job duties. The claimant signed the written expectations list on October 19, 2012.

The claimant arrived for work on November 1 shortly before the pharmacy was to open and saw Store Director Gary McCormick who reminded him that he was to make sure the return to stocks were done during his upcoming Saturday shift as it was also inventory weekend. The claimant became angry and said that it was another employee's job to perform the return to stock. Mr. McCormick reminded him that he had been told verbally and in writing only two weeks prior that the return to stock function was required of the pharmacist working on

Saturday. The claimant denied ever seeing anything in writing that put him on notice that he was to perform the return to stock function and told Mr. McCormick to produce the written document. The claimant then made a comment that since he was no longer the pharmacy manager it should not be his responsibility and said, "I didn't know it was part of my f**king job." (Employer's Exhibit One, page 42). The claimant then stormed out of Mr. McCormick's office but not before he called Mr. McCormick ridiculous and threatened to report Mr. McCormick to his supervisor. Mr. McCormick offered him the direct dial telephone number of his supervisor. Mr. McCormick let the claimant cool off while he printed out the written warning (Employer's Exhibit One, page 36), and highlighted the portion requiring the Saturday pharmacist perform the return to stock function. Mr. McCormick took the document to the claimant in the pharmacy and handed it to him. The claimant said to Mr. McCormick, "was that so hard?" The claimant was disrespectful toward his supervisor and was clearly wrong about whether he had previously been told that performing the return to stock function was his job responsibility. Mr. McCormick returned to his office and had the claimant paged to call him. When the claimant returned his page, Mr. McCormick warned him not to take his anger out on his staff and that they were to meet at the end of the day. The claimant returned to Mr. McCormick's office at ten minutes of four and told him that he only had ten minutes to speak with him before he had to leave for the day. When it became clear to Mr. McCormick that the meeting was not going to be completed in ten minutes he told the claimant that he was going to speak to him and complete their conversation before he worked again. The claimant stormed out of Mr. McCormick's office and the store. About an hour later the claimant sent Mr. McCormick an e-mail stating that he was working at the Marcus, Iowa location the next day and would not be able to meet with Mr. McCormick. Mr. McCormick told him that he was to report to the store at 8:30 a.m. to meet with him to complete their discussion. The claimant said he wanted his attorney present and Mr. McCormick said to bring his attorney if he wanted. The claimant then told Mr. McCormick that he just wanted another employee present during the meeting. Mr. McCormick arranged to have pharmacy manager Bill Darrah present for the meeting. Mr. McCormick intended to discipline the claimant for his language and insubordination but had no intention of discharging the claimant at the November 2 meeting.

When the claimant arrived the next morning for the meeting he wanted another person, who was not his attorney to sit in on the meeting. Employer's exhibit one makes clear that no human resources manager gave the claimant permission to bring anyone he wanted to the meeting. Nor does the employer's handbook or policies, a copy of which had been given to the claimant, allow an employee to bring anyone they want to employee-employer meetings. Mr. McCormick refused to let the claimant bring an unidentified person into the meeting and told him that Mr. Darrah, the claimant's direct supervisor, would be present during the meeting. The claimant refused to meet with his direct supervisor and Mr. McCormick to discuss his behavior. Mr. McCormick told the claimant that he was to meet with him and Mr. Darrah or be discharged. The claimant refused to meet, threw his keys at Mr. McCormick and walked out of the store.

The claimant has received unemployment benefits after the separation on a claim with an effective date of November 4, 2012.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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.

Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). An employer has the right to expect employees to meet with them to discuss performance issues. The claimant had meet with Mr. McCormick previously on many occasions. There is no legal right for an employee to bring their attorney to a disciplinary meeting. The claimant was not allowed to bring anyone he chose to a disciplinary meeting. Under these circumstances it was unreasonable for the claimant to refuse to meet with his employer. In light of the claimant's long history of discipline as well as his conduct, that is refusing to meet with management to discuss his actions, the administrative law judge concludes substantial disqualifying misconduct has been established and benefits are denied.

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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code § 96.3(7). In this case, the claimant has received benefits but was not eligible for those benefits.

DECISION:

The November 27, 2012 (reference 01) decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

REMAND: The matter of determining the amount of the potential overpayment and whether the overpayment should be recovered under Iowa Code § 96.3(7)b is remanded to the Agency.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/css