

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

PAUL R BARNES
Claimant

APPEAL NO. 08A-UI-05065-LT

**ADMINISTRATIVE LAW JUDGE
AMENDED DECISION**

HY-VEE INC
Employer

**OC: 06/10/07 R: 02
Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge/Misconduct
Iowa Code § 96.3(7) - Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the May 22, 2008, reference 04, decision that allowed benefits. After due notice was issued, a telephone conference hearing was held on June 23, 2008. Claimant participated. Employer participated through Jeremy Low, Barbara Dewart, David Abrahamson, Tracy Kading and Al Boch and was represented by Barbara Frazier Lehl of Unemployment Services. Employer's Exhibits 1 through 4 were received.

ISSUE:

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits and if so, whether he is overpaid benefits as a result.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant was employed as a part time delivery driver from February 4, 2006 until April 21, 2008 when he was discharged. Jeremy Low received complaints from customer Cerro Gordo County Jail cook Barbara Dewart and kitchen manager Bobbie Johnson that claimant was "rude" and had a "bad attitude" on April 21 when he delivered bread during serving hours and had to wait for entrance. He told Dewart he had other things to do, left and she did not know when he would return to get the bread racks. A few months earlier he had verbally complained about inmates, food, the war, and made a comment about how he hates inmates and they "should be lined up and shot." He also made disparaging comments about the kitchen staff not helping him unload even though it is his job to unload without assistance, especially when delivering during meal times. During the investigation on April 21, the owner of Tug's Daycare indicated claimant regularly became upset when the refrigerator was full and he could not put milk away. Independently and without knowledge of the complaint from the jail employees, deli manager David Abrahamson also complained that on April 21 claimant interrupted him while he was assisting a customer and then would not leave the area until asked for the third time. He also bent forward and asked Abrahamson to kiss him on the cheek.

On August 29, 2007 an employee from another store complained that he observed claimant in the company van at a red light using foul language and waving his arms about. On August 31, Tracy Kading met with claimant and explained to him he was “the face of Hy-Vee” and could not “vent” and must control his anger while at work and that if it happened again, they would have to “part company.” (Employer’s Exhibit 1)

The administrative record reflects that claimant was paid unemployment benefits in the amount of \$516.00 since filing a claim with an original claim date of June 10, 2007 (additional claim date effective April 20, 2008) and \$292.00 since filing a new claim with an effective date of June 8, 2008.

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.

The Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. EAB*, 531 N.W.2d 645 (Iowa App. 1995).

Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990).

While claimant may not have received a copy of the August 2007 memo, he was aware of employer's concern about his behavior and the potential impact to his employment status. Claimant's recent verbal mistreatment of customers, both internal and external, after having been warned to control his temper and reminded that he represents the employer to the public is evidence of his willful intent not to abide by employer's reasonable expectations of courtesy towards customers and amounts to job-related misconduct. Benefits are denied.

Iowa Code § 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The May 22, 2008, reference 04, 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. The claimant is overpaid benefits in the amount of \$808.00.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

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