

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RICHARD WILSON
Claimant

APPEAL NO. 08A-UI-01126-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 11-25-07 R: 03
Claimant: Respondent (2)

Section 96.5-2-a – Discharge/Misconduct
871 IAC 24.23(26) – Partial Unemployment
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the January 24, 2008, reference 02, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on February 18, 2008. The claimant participated in the hearing. Natalie McGee, Director of Human Resources; Jim Moore, Assistant Vice-President of Transportation; and Tim Speir, Employer Representative, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant through a disciplinary layoff for work-connected misconduct and whether the claimant is still employed at the same hours and wages.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant is employed as part-time truck driver for Hy-Vee. He began his employment December 15, 2005. Part-time employees are not guaranteed hours but the claimant averaged 42.5 hours per week in December because so many other employees were on vacation and 30 to 35 hours per week in January. He also failed to work all the hours available to him because he did not feel he received enough notice to help his girlfriend take care of her children. The claimant received a written warning and two-week suspension from January 7 through January 21, 2008, for falsifying his DOT logbook, indicating he had worked the allowed 14 hours when he actually worked 19 hours December 30, 2007, and repeatedly being late for deliveries. He was previously warned March 6, 2006, for pulling over because he was falling asleep and being late for his delivery and August 13, 2007, for making a late delivery and taking excessive breaks on his way to his delivery.

The claimant claimed and received unemployment insurance benefits during his two-week disciplinary layoff from this employer.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was laid off from employment for disciplinary reasons and is still employed in his part-time job at the same hours and wages.

871 IAC 24.32(9) provides:

(9) Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

Iowa Code section 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 24.23(26) provides:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

(26) Where a claimant is still employed in a part-time job at the same hours and wages as contemplated in the original contract for hire and is not working on a reduced workweek basis different from the contract for hire, such claimant cannot be considered partially unemployed.

The employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant was suspended for disciplinary reasons after admittedly and knowingly violating DOT regulations. Under these circumstances, the administrative law judge concludes the disciplinary layoff seems appropriate as the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The remaining issue is whether the claimant is still employed at the same hours and wages. The administrative law judge concludes he is working the same hours and wages as contemplated in his original contract of hire and cannot be considered partially unemployed. Therefore, benefits are denied.

Iowa Code section 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 January 24, 2008, reference 02, decision is reversed. The claimant was discharged from employment due to job-related misconduct and is not partially unemployed. 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 \$720.00 for the two weeks ending January 19, 2008.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

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