

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MELISSA J TULLY
Claimant

HY-VEE INC
Employer

APPEAL 15A-UI-04729-EC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 03/29/15
Claimant: Appellant (1)

Iowa Code §96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r.871-24.32(1)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant/appellant, Melissa Tully, filed an appeal from the April 10, 2015, (reference 01) unemployment insurance decision that denied benefits based upon misconduct, her violation of a known company rule. The parties were properly notified about the hearing. A telephone hearing was held on May 27, 2015. The claimant did not participate. She was not available at the telephone number provided, despite two attempts to reach her and two telephone messages left for her, providing options for her to participate in the hearing. The employer, Hy-Vee Inc, participated through Evangeline Gaudet, hearings representative; Greg Adams, Manager of Store Operations; and Taylor Ritchhart, Assistant Store Manager. Mr. Adams and Ms. Ritchhart testified during the hearing.

The employer submitted exhibits, which were collectively marked as Exhibit E and were admitted into the record without objection. The claimant's appeal letter was marked as Exhibit C and was admitted into the record over the employer's objection.

The claimant called the IWD Appeals Bureau later on May 27, 2015, about three hours after her hearing was scheduled to begin. She asked whether the hearing could be rescheduled. She was informed that she would receive the written decision in the mail, and could take action following receipt of that written decision. This decision is based on the record as presented through the testimony and exhibits admitted during the hearing on May 27, 2015.

ISSUE:

Was the claimant discharged for disqualifying job related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed part-time, working about 15 hours per week, most recently as a cashier, at the Hy-Vee store in Pleasant Hill, Iowa. She had been working part-time for the past year. She previously alternately worked part-time, then full-time, and then part-time at this store. She

began working there on November 29, 2010. She was separated from this employment on March 27, 2015, when she was discharged for misconduct, specifically for violating a known company rule.

The employer participated through Greg Adams, Manager of Store Operations; and Taylor Ritchhart, Assistant Store Manager. Mr. Adams and Ms. Ritchhart testified during the hearing. Both are employed at the Pleasant Hill, Iowa Hy-Vee store, where the claimant, Melissa Tully, worked.

The pertinent evidence is undisputed. On March 27, 2015, the claimant took a box of a Hy-Vee brand of naproxen sodium, a pain reliever, from the store shelf. (Exhibit C; Exhibit E1) She wrote it off as "removed from inventory." (Exhibit C; Ritchhart testimony) She did not respond to the assistant store manager's question regarding the item. (Ritchhart testimony) She took the bottle out of the box, threw the box away, and ingested some of the tablets. (Ritchhart testimony; Adams testimony) She had done this many times before. (Exhibit C) She did not remove the bottle from the store. (Exhibit C; Adams testimony) She put it in the first aid kit after she consumed some tablets from it. (Exhibit C)

The claimant mistakenly believed that it was acceptable to take a bottle from the store shelf, mark it as removed from inventory, and consume from it, if the first aid kit did not contain the pain reliever she desired. (Exhibit C)

She should have told a manager that she wanted to purchase an item, and then purchase it from another cashier, and only on her break. (Adams testimony) The employer's store policy and company policy requires a paid receipt to be with the employee consumer at all times. (Exhibit E) The employer regularly discharges employees for similar violations of the policy. (Adams testimony)

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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986).

In her appeal letter, the claimant admitted that she had done this many times before, even though this action violated the store policies and the company policies. These policies include a warning that violation of any of the policies could result in termination of her employment. The claimant's repeated unauthorized removal of store property from the shelf, her consumption of store property without properly purchasing it, or and her refusal to respond to the manager's question, is evidence of carelessness to such a degree of recurrence as to rise to the level of disqualifying job related misconduct, or is evidence of deliberate theft. Either one is disqualifying job related misconduct. Benefits are denied.

As stated above, the claimant/appellant did not participate in the hearing. She was not available at the telephone number she had provided at the time scheduled for the hearing. This administrative law judge made two separate attempts to reach her for the hearing, and left two detailed messages. Then, I chose to exercise the discretion allowed by the pertinent statute and rule, proceeded with the hearing, and elected to issue a decision on the merits.

The Iowa Administrative Procedure Act at Iowa Code § 17A.12(3) provides in pertinent part:

If a party fails to appear or participate in a contested case proceeding after proper service of notice, the presiding officer may, if no adjournment is granted, enter a default decision or proceed with the hearing and make a decision in the absence of the party. ... If a decision is rendered against a party who failed to appear for the hearing and the presiding officer is timely requested by that party to vacate the decision for good cause, the time for initiating a further appeal is stayed pending a determination by the presiding officer to grant or deny the request. If adequate reasons are provided showing good cause for the party's failure to appear, the presiding officer shall vacate the decision and, after proper service of notice, conduct another evidentiary hearing. If adequate reasons are not provided showing good cause for the party's failure to appear, the presiding officer *shall deny* the motion to vacate. (Emphasis added)

Agency rules at Iowa Admin. Code r. 871-26.14(7) provide:

If a party has not responded to a notice of telephone hearing by providing the appeals bureau with the names and telephone numbers of the persons who are participating in the hearing by the scheduled starting time of the hearing or is not available at the telephone number provided, the presiding officer may proceed with the hearing. If the appealing party fails to provide a telephone number or is unavailable for the hearing, the presiding officer may decide the appealing party is in default and dismiss the appeal as provided in Iowa Code § 17A.12(3). The record may be reopened if the absent party makes a request to reopen the hearing under subrule 871-26.8(3) and shows good cause for reopening the hearing. (Emphasis added)

In the interests of efficiency, this administrative law judge elected to proceed with the hearing and issue this decision on the merits. If the claimant/appellant wishes to pursue her appeal, she must take one of the actions described below, following the instructions on the first page of this decision.

Pursuant to the rule, the appellant must make a written request to the administrative law judge that the hearing be reopened within 15 days after the mailing date of this decision. The written request should be mailed to the administrative law judge at the address listed at the end of this decision and must explain the emergency or other good cause that prevented the appellant from participating in the hearing at its scheduled time. The appellant also has the option to appeal the decision directly to the Employment Appeal Board at the address listed in the caption appeal rights information.

DECISION:

The April 10, 2015, (reference 01) decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Emily Gould Chafa
Administrative Law Judge

Decision Dated and Mailed

ec/pjs