

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CAROLYN S ARMSTRONG
Claimant

APPEAL NO. 09A-UI-03016-E2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 01/25/09
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated February 17, 2009, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on March 20, 2009. Claimant participated personally. Employer participated by Aaron Garms and Tim Speir, representative. Exhibit One, pages 1-9, was admitted into evidence.

ISSUE:

The issue in this matter is whether claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant last worked for employer on January 23, 2009.

Claimant was discharged on January 23, 2009 by employer because she failed an underage compliance check and sold tobacco to a minor. The claimant received a warning in June 2008 when she sold alcohol to a minor and was told that she would be terminated if she ever sold prohibited items to a minor again. The employer provided the claimant their policy, which the claimant acknowledged receiving, which prohibits sale of alcohol and tobacco to minors. The employer's cash registers require that employees enter a birth date whenever alcohol or tobacco is sold. As part of Hy-Vee's policy they hire a company to check compliance with their policies on sale to minors. On January 18, 2009, the claimant sold tobacco to a minor using an ID which had a birth date which would make the sale illegal. The claimant entered the wrong date into the cash register and made the sale. There was no evidence the claimant intentionally sold the product to a minor. The claimant testified she made a mistake entering the information into her cash register.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the employer has failed to prove misconduct.

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.

The employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Repeated failure to follow an employer's instructions in the performance of duties is misconduct. Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employer has a right to expect employees to follow instructions in the performance of the job. The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation.

The employer has a significant interest in ensuring that minors are not sold prohibited products. The claimant made a mistake in entering information into the cash register. The claimant was warned over seven months before about following company policy. While perfection in performance in this area is an appropriate goal for an employer, the question is was the claimant's conduct misconduct. The evidence shows two isolated incidents of negligent performance. The claimant made an error in entering information to a cash register. There is no evidence whatsoever the claimant intended to sell to a minor.

In this matter, the evidence fails to establish that claimant was discharged for an act of misconduct when claimant violated employer's policy concerning selling prohibited items to a minor.

DECISION:

The decision of the representative dated February 17, 2009, reference 01, is reversed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

James Elliott
Administrative Law Judge

Decision Dated and Mailed

jfe/pjs