

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**BENJAMIN W JOHANNSEN**  
Claimant

**APPEAL NO. 08A-UI-01299-DT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**HY-VEE INC**  
Employer

**OC: 01/13/08 R: 04**  
**Claimant: Respondent (1)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

Hy-Vee, Inc. (employer) appealed a representative's January 31, 2008 decision (reference 01) that concluded Benjamin W. Johannsen (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on February 20, 2008. The claimant participated in the hearing and was represented by personal representative Mark Johannsen. Tim Speir of Unemployment Insurance Services appeared on the employer's behalf and presented testimony from one witness, Nick Burke. One other witness, Jackie Kuennen, was available on behalf of the employer but did not testify. During the hearing, Employer's Exhibits One through Three were entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUE:**

Was the claimant discharged for work-connected misconduct?

**FINDINGS OF FACT:**

The claimant started working for the employer on a part time basis on June 26, 2001 at the employer's Dubuque, Iowa, store. As of April 18, 2006 he began working full time, and as of July 23, 2007 he worked full time as a clerk in the employer's Chinese food service. His last day of work was December 27, 2007. The employer discharged him on that date. The reason asserted for the discharge was not performing up to the standards for his position.

The claimant was given a written warning for poor job performance on December 7, 2006 for not completing assigned tasks. He received another written warning for poor job performance on June 29, 2007, again for not completing all of his assigned duties. After his transfer to the Chinese food service department in July 2007, he had a performance review on October 10 in which he was told that the employer was not satisfied with his job performance. On December 9, he was given a warning memorandum as to a situation where the claimant had gone home sick on December 7 even though the employer had requested that the claimant make sure that a guest cook's supply needs were seen to, and he was reminded that the employer was not satisfied with his job performance.

On December 17, the claimant was on the schedule for a 9:00 a.m. to 5:00 p.m. shift. When he had not arrived by 10:00 a.m., the employer called him. The claimant had misread the schedule and had not realized he was scheduled for a shift that day. A similar situation had not occurred in the past, and he did not have any disciplinary warnings specifically for attendance, although reference to attendance had been briefly mentioned in the claimant's October 10, 2007 review. The claimant did come in by noon on December 17 and worked the remainder of the shift. When he came in, an appointment was set for December 27 to discuss the claimant's employment status. When the meeting occurred, the employer discharged the claimant.

## **REASONING AND CONCLUSIONS OF LAW:**

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

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 focus of the definition of misconduct is on acts or omissions by a claimant that “rise to the level of being deliberate, intentional or culpable.” Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer’s interest, such as found in:
  - a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
  - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
  - a. Manifest equal culpability, wrongful intent or evil design; or
  - b. Show an intentional and substantial disregard of:
    1. The employer’s interest, or
    2. The employee’s duties and obligations to the employer.

Henry, supra.

The reason cited by the employer for discharging the claimant is his unsatisfactory job performance, with the final incident being his absence for the first portion of his shift on December 17 due to incorrectly reading the schedule. The simple fact that an employee might have various incidents of unsatisfactory job performance does not establish the necessary element of intent; misconduct connotes volition. A failure in job performance is not misconduct unless it is intentional. Huntoon, supra; Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). There is no evidence the claimant intentionally failed to properly verify his correct work schedule. While the employer may have had a good business reason for discharging the claimant, it has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant’s actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

#### **DECISION:**

The representative’s January 31, 2008 decision (reference 01) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

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Lynette A. F. Donner  
Administrative Law Judge

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Decision Dated and Mailed

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