

**IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI**

**CLIFFORD W HART
16232 COUNTRY CLUB DR
PEOSTA IA 52068**

**HY-VEE FOOD STORES INC
c/o TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283**

**TALX UC EXPRESS
3799 VILLAGE RUN DR #511
DES MOINES IA 50317**

**Appeal Number: 05A-UI-08747-JTT
OC: 07/24/05 R: 04
Claimant: Respondent (1)**

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.32(8) – Current Act Required

STATEMENT OF THE CASE:

Hy-Vee filed a timely appeal from the August 16, 2005, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on September 29, 2005. Clifford Hart participated. David Williams of TALX UC eXpress represented Hy-Vee and presented testimony through Store Director Chuck Donnelly and Pharmacy Manager Michaela Otting.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Clifford Hart was employed by Hy-Vee as a full-time pharmacist from April 23, 2002 until July 22, 2005, when Store Director discharged him for alleged unethical practices. The final

incident that prompted the discharge occurred on June 16, 2005 and came to the attention of Pharmacy Manager Michaela Otting on the same day. Ms. Otting discerned that Mr. Hart had miscalculated the amount of water that needed to be added to a “reconstitutable” prescription. In addition, Mr. Hart had instructed a pharmacy technician to add more water than was called for under the reconstitution formula. Thus, the pharmacy would issue the number of milliliters the doctor ordered, but the solution would be a less concentrated than the doctor had ordered. Ms. Otting had Mr. Hart correct his mistake the same day. Though Ms. Otting believed the incident constituted unethical practice and provided grounds for discharging Mr. Hart, Ms. Otting wanted to speak with the pharmacy manager at another Hy-Vee store before she took further steps to discipline Mr. Hart. Mr. Hart did not learn until he was discharged on July 22, more than a month after the incident, that his conduct placed his employment in jeopardy.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Hart was discharged for a current act of misconduct in connection with his employment. It does not.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

Since the claimant was discharged, the employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act to misconduct, a discharge her misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). The date on which the employee was informed his conduct provided grounds for dismissal, not the date of the discharge, is to be considered in determining whether the misconduct was a past or current act. See Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988)(Lapse of four days from final act until the claimant was notified that his conduct was grounds for dismissal, did not make final act a "past act").

The evidence indicates a delay of more than a month between the date of the incident that prompted the discharge came to the attention of the employer and the day Mr. Hart was advised that the conduct subjected him to possible discharge. The June 16 incident no longer constituted a current act of misconduct on July 22. The administrative law judge need not make any conclusion regarding whether Mr. Hart's actions constituted misconduct, because, even if they did, the "past act" of misconduct would not disqualify Mr. Hart for benefits. See 871 IAC 24.32(8).

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Hart was discharged for no disqualifying reason. Accordingly, Mr. Hart is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Hart.

DECISION:

The Agency representative's decision dated August 16, 2005, reference 01, is affirmed. The claimant was discharged for misconduct. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to the claimant.

jt/kjw