

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

PEGGY A OWENS

Claimant

APPEAL NO. 12A-UI-02059-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC

Employer

OC: 01/15/12

Claimant: Appellant (1)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Peggy Owens filed a timely appeal from the February 21, 2012, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on March 19, 2012. Ms. Owens participated personally and was represented by Attorney Luke Guthrie. Sue Coppola of Corporate Cost Control represented the employer and presented testimony through Sailu Timbo, Ben Vanzwol and Phillip Burrell. Exhibits One through Four were received into evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Peggy Owens was employed by Hy-Vee as a full-time Assistant Manager of Perishables until January 12, 2012, when Store Director Sailu Timbo and Loss Prevention Officer Phillip Burrell discharged her from the employment for “unauthorized removal of company property.”

On December 24, 2011, Ms. Owens prepared a gift basket that included a couple of bottles of wine, a couple bags of candy and other items. The retail value of the basket was \$54.99. Ms. Owens did not ring up the alcohol or other gift basket contents before removing them from the store. This was in violation of established policy and procedures. Ms. Owens had prepared the gift basket for herself under the guise that she was preparing it for a customer who had ordered it as part of a catering order. On December 26, the two kitchen clerks who had been working with Ms. Owens on December 24 at the time she removed the gift basket from the store reported their observations to the kitchen manager, Brett Smith. One employee had questioned Ms. Owens about whether the gift basket had been rung up. Ms. Owens had assured the employee that everything was in order. Another employee had assisted Ms. Owens with taking items to Ms. Owens’ car so that they could be delivered to customers. These items included the gift basket in question. That same employee observed the gift basket still in Ms. Owens’ car after she completed the deliveries. On December 26 or 27, Mr. Smith forwarded the information

provided by the two employees to Store Director Sailu Timbo and Manager of Perishables Ben Vanzwol. Mr. Timbo and Mr. Vanzwol conferred with other managers and then commenced an investigation into the matter.

On December 29, Mr. Timbo interviewed the two employees who had reported the matter to the kitchen manager. On that same day, Mr. Timbo received a report from another employee that Ms. Owens had used the employee's cash register login on December 28 to create a fictitious return of 16 cans of tomato sauce. Mr. Timbo researched that matter and learned that the employer's perpetual inventory record for that particular item was off by precisely 16 cans. Mr. Timbo then contacted the employer's loss prevention department for guidance. Due to the holiday season and other pending investigations, the soonest the loss prevention officer was able to come to the store to assist with the investigation was January 12. On December 31, Mr. Timbo reviewed surveillance video from December 24 that showed a portion of Ms. Owens' handling of the gift basket. On December 31, Manager of Perishables Ben Vanzwol telephoned the Colorado customer for whose catering order Ms. Owens had ostensibly created the gift basket. That customer had no knowledge of any gift basket and was concerned that she not be charged for one. On or about January 3, Mr. Vanzwol asked Ms. Owens what department she would ring up gift baskets under. After obtaining that information, Mr. Vanzwol searched and found no record of the gift basket in question being rung up.

The employer concluded its investigation on January 12, 2012, when Loss Prevention Officer Phillip Burrell came to the store and interviewed Ms. Owens. Ms. Owens admitted at that time that she had created the basket for her personal use, had not paid for it, and had taken it to her home, where it had remained. Ms. Owens acknowledged that she was aware of the employer's policy that prohibited employees from removing the employer's property from the store without authorization. Mr. Burrell had Ms. Owens prepare a written statement. Mr. Burrell and Mr. Timbo then notified Ms. Owens that she was discharged from the employment.

REASONING AND CONCLUSIONS OF LAW:

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 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 of misconduct, a discharge for 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). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988). The employer has provided a reasonable explanation regarding the steps taken between December 26 and January 12 to investigate the matter and why the investigation was not completed until January 12. The record establishes a current act for unemployment insurance purposes.

The testimony presented at the hearing indicates that Ms. Owens' statements regarding why she created the gift basket, why she took possession of the gift basket, and what she did with the gift basket once it was in her possession, have been inconsistent and evolving. Ms. Owens' assertion that she created the gift basket for a bona fide customer order for "Sue Robinson" is not credible. Ms. Owens conspicuously omitted reference to the alleged Ms. Robinson when questioned by the employer about the matter. Ms. Owens has made the contradictory assertions that she was afraid to return the gift basket to the store for fear she would be accused of theft and that she just took it home for safekeeping with the intention of returning it to the store at some indefinite later time. Much of Ms. Owens' testimony was fabrication and not worthy of much weight. Ms. Owens even hedged on whether and to what extent she was aware of the employer's written policy regarding unauthorized removal of store property. Ms. Owens had been a member of management an extended period and not only was aware of the policy, but was responsible for enforcing it.

The weight of the evidence establishes that this is not a case of carelessness or neglect, but is instead a case of employee theft. Ms. Owens intentionally made the basket for her own use, intentionally removed it from the store without paying for it, and intentionally took it home so that she could complete the process of converting the employer's merchandise to her personal use. Ms. Owens' actions were in willful and wanton disregard of the employer's interests.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Owens was discharged for misconduct. Accordingly, Ms. Owens is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged for benefits paid to Ms. Owens.

DECISION:

The Agency representative's February 21, 2012, reference 01 decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The employer's account will not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs