

**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**

**JACQUELYN SWEET
2438 – 7TH ST
SIOUX CITY IA 51105-3205**

**HY-VEE INC
C/O TALX UCM SERVICES INC
PO BOX 283
ST LOUIS MO 63166-0283**

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

**Appeal Number: 06A-UI-04053-JTT
OC: 03/19/06 R: 01
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

STATEMENT OF THE CASE:

Hy-Vee filed a timely appeal from the April 5, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on May 1, 2006. Claimant Jacquelyn Sweet participated. David Williams of TALX UC eXpress represented the employer and presented testimony through Store Director Jim Simmons and Hy-Vee customer Marge Kool.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Jacquelyn Sweet was employed by Hy-Vee as a part-time checker from September 21, 2002 until March 17, 2006, when Store Director Jim Simmons discharged her.

The final incident that prompted the discharge occurred on March 13 and came to the employer on March 15. Ms. Sweet had just returned an empty cart to the store entrance and was heading back into the store when she noticed a customer about to exit the store. Ms. Sweet observed that the customer had a single piecrust in her cart that was not bagged and that the customer's purse was situated such that it may have obscured the customer's vision of the piecrust. Ms. Sweet was concerned that the customer may have forgotten to pay for the item. Ms. Sweet asked the customer, Marge Kool, if she was leaving the store with merchandise she had not paid for. Ms. Kool had her sales receipt in hand and produced it for Ms. Sweet's review. The receipt reflected that Ms. Kool had in fact paid for the item. Ms. Sweet returned the receipt to Ms. Kool and went about her duties. Ms. Kool exited the store upset about what had just occurred. Two days later, Ms. Kool contacted Store Director Jim Simmons to complain about the interaction with Ms. Sweet. Ms. Kool indicated that Ms. Sweet had accused her of shoplifting in front of other customers. The employer's policy is that only managers are authorized to address suspected shoplifting occurrences and are only to take action if they watched the customer go through the check out lane and have confirmed that the customer did not pay for the item. Cashiers and other regular staff were not authorized to address such matters. Mr. Simmons regularly reviewed the policy with staff and Ms. Sweet was aware of the policy. Ms. Sweet had not suspected Ms. Kool of shoplifting, but instead, merely believed a customer had forgotten to pay for an item. Ms. Sweet denied being rude to or accusing the customer.

In making the decision to discharge Ms. Sweet, Mr. Simmons considered a reprimand he had issued to Ms. Sweet six months prior. The reprimand resulted from a customer complaint. The customer had been in Ms. Sweet's lane with her children in tow. The customer had used a special "car" cart. One of the customer's children had climbed onto the roof of the car and was playing with the ATM pad. Because the child was pushing buttons on the pad, Ms. Sweet was unable to complete the customer's transaction. Ms. Sweet asked or instructed the child to stop playing with the pad. When the customer complained, she demanded an apology. Mr. Simmons directed Ms. Sweet to write an apology and Ms. Sweet complied. Mr. Simmons told Ms. Sweet that if she prompted another customer complaint, she would be discharged.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Sweet was discharged for misconduct in connection with the 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).

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).

The weight of the evidence in the record indicates that Ms. Sweet made a good faith error in judgment in addressing Ms. Kool about the piecrust. Ms. Sweet was attempting to serve the interests of the employer. Ms. Kool reasonably concluded, based on what she observed, that the customer might have forgotten to pay for the item. Forgetting to pay for an item is distinct from intentionally attempting to steal the item and Ms. Sweet reasonably acknowledged and acted upon this distinction. While it is understandable that Ms. Kool may have been upset by the interaction, the evidence does not support a conclusion that Ms. Sweet was rude or accusatory during the interaction. The evidence fails to establish willful misconduct, negligence or carelessness on the part of Ms. Sweet in connection with the incident that prompted the discharge. Even if Ms. Sweet had been negligent or carelessness in connection with the final incident, the evidence would not establish negligence or carelessness sufficiently recurrent to rise to level of willful disregard of employer's interests.

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

DECISION:

The Agency representative's decision dated April 5, 2006, reference 01, is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

jt/pjs