

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Brett Breard was employed by Hy-Vee as a full-time kitchen clerk from March 9, 2004 until August 25, 2005, when Store Director Mike Christensen discharged him for misconduct.

The final incident that prompted the discharge occurred on August 25, 2005, when Mr. Breard stole approximately \$20.00 from the Hy-Vee kitchen cash register and honor system coffee money basket. To streamline service for regular morning customers, the Hy-Vee maintained a basket into which customers could place payment for coffee. After the morning business slowed, a member of the kitchen staff would tally the money in the coffee money basket, figure the appropriate tax, and enter the money collected into the register as one large transaction. At 10:51 a.m. on August 25, Kitchen Clerk Kay Gerst returned to the kitchen area and the cash register area. Ms. Gerst noticed that Mr. Breard was at the cash register with the drawer open and "No Sale" displayed on the register. Mr. Breard was putting some money in the register and closed the drawer as Ms. Gerst approached. Ms. Gerst noticed that the coffee basket money was gone. Ms. Gerst thought the situation was odd because there would be no need to use a "No Sale" transaction in connection with ringing up the coffee basket money. A "No Sale" transaction could not be entered accidentally because of the multiple steps and/or key strokes involved. Soon thereafter, Mr. Breard departed for a catering delivery. Ms. Gerst reported her observations to an assistant manager and the matter quickly came to the attention of Store Director Mike Christensen. Mr. Christensen reviewed the kitchen cash register transactions by means of the store's computer system and noted that there was no entry for the coffee basket money. Mr. Christensen had Accounting Coordinator Becky Enfield count the money in the kitchen cash registers. The register to which Mr. Breard had been assigned was \$3.86 short. Mr. Christensen would have expected the register to be "long" if Mr. Breard had placed the coffee basket money in the register without ringing it up.

When Mr. Breard returned to the store, Mr. Christensen summoned him to the office. Mr. Christensen asked Mr. Breard where the coffee money was. Mr. Breard indicated he had put it in the cash register drawer. Mr. Christensen asked Mr. Breard why he had not rung up the sale. Mr. Breard indicated he thought he had. Mr. Christensen advised the register records indicated no such transaction. Mr. Christensen asked Mr. Breard why he did not ring up the coffee basket money and Mr. Breard responded, "I don't know." Mr. Christensen asked Mr. Breard whether he was familiar with the proper procedure for handling the coffee basket money and Mr. Breard indicated he was. Mr. Christensen asked how much the coffee basket money had amounted to and Mr. Breard indicated \$16.23. Mr. Christensen asked Mr. Breard where he put the \$16.23 and Mr. Breard indicated he put it in the cash register drawer. Mr. Christensen explained that if that were the case, the drawer would be long when, in fact, it was short. Mr. Christensen again asked Mr. Breard why he had not rung up the coffee basket money and Mr. Breard again indicated, "I don't know." Mr. Christensen again asked Mr. Breard whether he was familiar with the proper procedure for handling the coffee basket money and Mr. Breard indicated he was. Mr. Christensen then advised Mr. Christensen that he was being discharged for failing to follow proper procedure regarding handling the coffee money. Because no one had witnessed Mr. Breard place money in his pocket, Mr. Christensen did not say he was discharging Mr. Breard for theft. Mr. Christensen advised Mr. Breard that the employer was missing \$20.00 from the register and asked Mr. Breard whether it would be necessary to call the police to learn whether Mr. Breard had a twenty-dollar bill in his possession. Mr. Breard indicated he did have a twenty-dollar bill in his pocket that he had brought from home. Mr. Breard asked not to be discharged and offered to pay the employer for any shortage in the register.

Mr. Breard established a claim for benefits that was effective August 21, 2005 and has received \$2,580.00 in benefits.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Breard was discharged for misconduct in connection with his employment. It does.

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).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4).

The weight of the evidence in the record establishes that Mr. Breard did, in fact, steal approximately \$20.00 from the Hy-Vee kitchen register and coffee money basket on the date in question. The circumstantial evidence presented through the testimony of witness Kay Gerst and Becky Enfield and Mr. Breard's inability to appropriately explain what had become of the coffee basket money all support the conclusion that Mr. Breard stole the money. Circumstantial evidence carries the same weight as direct evidence. Mr. Breard asserted at the hearing that he had placed the money in the cash register as a "No Sale" transaction while he looked for a calculator to use in figuring the tax and then got distracted and forgot about the coffee basket money. Mr. Christensen questioned Mr. Breard within an hour and a half Ms. Gerst's observations. Mr. Breard made no mention at that time of placing the money in the register while he looked for a calculator. This was critical information and it is implausible that Mr. Breard would have forgotten to share this information with Mr. Christensen. The administrative law judge concludes that Mr. Breard's testimony regarding placing the money in the register while he searched for a calculator is not credible.

Based on the weight of the evidence in the record an application of the appropriate law, the administrative law judge concludes that Mr. Breard was discharged for intention and substantial misconduct in connection with the employment. Accordingly, Mr. Breard is disqualified for benefits until he has worked in and been paid wages equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Breard.

Iowa Code Section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The \$2,580.00 in benefits Mr. Breard had received to date constitute an overpayment that Mr. Breard must repay.

DECISION:

The Agency representative's decision dated September 20, 2005, reference 01, is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account shall not be charged for benefits paid to the claimant. The claimant is overpaid \$2,580.00.

jt/s