

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**KIM R TORDAI**  
Claimant

**APPEAL NO. 07A-UI-08752-CT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**HY-VEE INC**  
Employer

**OC: 08/19/07 R: 02**  
**Claimant: Appellant (2)**

Section 96.5(2)a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Kim Tordai filed an appeal from a representative's decision dated September 12, 2007, reference 01, which denied benefits based on her separation from Hy-Vee, Inc. After due notice was issued, a hearing was held by telephone on October 23, 2007. Ms. Tordai participated personally and offered additional testimony from Chad Mason. The employer participated by Tim Flaherty, Store Director; Ryan Theesfeld, Kitchen Clerk; and Jamie Boedecker, Human Resources Manager. Exhibits One and Two were admitted on the employer's behalf. The employer was represented by David Williams of TALX Corporation. June Lee participated as the interpreter.

**ISSUE:**

At issue in this matter is whether Ms. Tordai was separated from employment for any disqualifying reason.

**FINDINGS OF FACT:**

Having heard the testimony of the witnesses and having reviewed all of the evidence in the record, the administrative law judge finds: Ms. Tordai was employed by Hy-Vee, Inc. from October 30, 2001 until August 14, 2007. She was employed full time as the Chinese Express manager. On August 13, 2007, a watermelon was damaged in the produce section. Because it could not be sold to the public, it was placed in the garbage.

Ms. Tordai retrieved the watermelon from the garbage and cut it up. She ate some and presented some of it to coworkers. She took the remainder home with her at the end of her shift. The employer's policy provides that no merchandise can be consumed or removed from the store unless payment is made beforehand. Because she did not pay for the watermelon, Ms. Tordai was discharged on August 14, 2007.

In making the decision to discharge, the employer also considered the fact that Ms. Tordai received a written warning on May 28, 2007 because she falsified her timecard. She received a verbal warning on April 1, 2007 because she took supplies for her area from other areas of the

store without making payment. She should have either ordered the supplies from the warehouse or made payment to the other departments from which she obtained the supplies.

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

An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). In order to support a disqualification from benefits, the evidence must establish that the final act that prompted the discharge constituted misconduct within the meaning of the law. In the case at hand, the final act that triggered Ms. Tordai's discharge was the fact that she removed a watermelon from the trash, consumed a portion of it and took the rest home without making payment.

The employer's policy requires that merchandise be paid for before it is consumed or removed from the store. A reasonable interpretation of the policy is that payment is only expected if the item is one for which the general public would be expected to pay. The employer's policy is not sufficient to put individuals on notice that items discarded in the garbage have to be paid for. The watermelon in question was one the employer had determined could not be sold to the public. Ms. Tordai took it out of the garbage only after the employer decided it could not be sold. For the above reasons, the administrative law judge concludes that Ms. Tordai did not commit misconduct on August 13.

The next most prior disciplinary action against Ms. Tordai was on May 28, 2007. This would not represent a current act in relation to the August 14 discharge date. Inasmuch as Ms. Tordai's discharge was not predicated on a current act that constituted misconduct, no disqualification is imposed. While the employer may have had good cause to discharge, conduct that might warrant a discharge from employment will not necessarily support a disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa 1983). For the reasons cited herein, benefits are allowed.

#### **DECISION:**

The representative's decision dated September 12, 2007, reference 01, is hereby reversed. Ms. Tordai was discharged but a current act of misconduct has not been established. Benefits are allowed, provided she satisfies all other conditions of eligibility.

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Carolyn F. Coleman  
Administrative Law Judge

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Decision Dated and Mailed

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