

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DAVID A MARKOFF
Claimant

APPEAL NO. 08A-UI-04848-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WALGREEN COMPANY
Employer

**OC: 06/17/07 R: 02
Claimant: Respondent (2)**

Section 96.5(2)a – Discharge
Section 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer, Walgreen, filed an appeal from a decision dated May 8, 2008, reference 02. The decision allowed benefits to the claimant, David Markoff. After due notice was issued, a hearing was held by telephone conference call on June 4, 2008. The claimant participated on his own behalf. The employer participated by Store Manager Jill Stoll and was represented by TALX in the person of Chris Scheibe.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

David Markoff was employed by Walgreen from August 16, 2007 until April 17, 2008, as a full-time assistant manager. The store receives merchandise from the warehouse in plastic bins or "totes." After the merchandise is removed and stocked on the shelves, the totes are put outside in the receiving area. The next time the truck comes from the warehouse, the empty totes are returned for future use. Each tote has printed on the side "Property of Walgreens" and "For Use of Walgreens only," and cost \$7.48.

In early April 2008, Store Manager Jill Stoll noticed there were fewer empty totes in the receiving area than there should have been. She contacted Loss Prevention Supervisor George Schaeffer, who investigated. He personally observed the receiving area from his parked vehicle and saw Mr. Markoff loading the totes into his vehicle.

Mr. Schaffer and Ms. Stoll interviewed the claimant on April 16, 2008, and he admitted he had between 38 and 40 totes at his home, which he had taken a few at a time over a period of a couple of weeks. He was doing some landscaping in his yard and intended to use the totes to haul dirt. He had received the employer's ethics policy, which requires all employees to protect the property and assets of the company.

The claimant maintained he did intend to return the totes after using them to haul dirt for his landscaping project, but he took them without authorization. It is not known whether the totes could have been reused by the company to ship merchandise after being used by Mr. Markoff to haul dirt. He was discharged on April 16 2008, by Ms. Stoll.

David Markoff has received unemployment benefits since filing an additional claim with an effective date of April 13, 2008.

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 claimant appropriated assets belonging to the company valued at nearly \$300.00. He took the totes without the knowledge or permission of his store manager to take home and use for his personal gardening project. This could have rendered the totes unusable for shipping merchandise in the future, and there is no firm evidence the claimant would have returned them in a timely manner, if at all. His conduct was not a one-time error in judgment, because he had taken all the totes over a period of time. Depriving the employer of the use of these items is a violation of the duties and responsibilities the employer has the right to expect of an employee. It is conduct not in the best interests of the employer and the claimant is disqualified.

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 claimant has received unemployment benefits to which he is not entitled. These must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of May 8, 2008, reference 02, is reversed. David Markoff is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount, provided he is otherwise eligible. He is overpaid in the amount of \$1,619.00.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/kjw