

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

REBECCA L TATMAN
Claimant

APPEAL NO. 11A-UI-08781-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 05/29/11
Claimant: Respondent (2R)

Section 96.5-2-a – Discharge
Section 96.3-7 – Benefit Overpayment

STATEMENT OF THE CASE:

Employer filed a timely appeal from a representative's decision dated June 21, 2011, reference 01, which found claimant eligible to receive unemployment insurance benefits. After due notice, a hearing was scheduled for and held on July 26, 2011. The claimant participated personally. Employer participated by Ms. Paula Mack, Hearing Representative and witnesses, Kelly Nieland, Human Resource Manager; Phil Munoz, Department Manager; and Danica Thome, Checker. Employer's Exhibits One and Two were received into evidence.

ISSUE:

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

FINDINGS OF FACT:

The administrative law judge, having considered the evidence in the record, finds: Rebecca Tatman was employed by Hy-Vee Inc. from November 5, 2010 until May 30, 2011 when she was discharged for violation of a company rule. Ms. Tatman worked as a part-time kitchen clerk and was paid by the hour. Her immediate supervisor was Todd Steinbeck.

Ms. Taman was discharged based upon an incident that took place on May 29, 2011. On that date the claimant obtained a soda drink from the company's dining area stating to Ms. Thome, the checker, "I won't be paying for this pop or break food later, so we don't have a problem." Because Ms. Thome recognized the claimant's actions as a clear violation of policy she reported the matter to management. Ms. Tatman was questioned about the matter and admitted taking the pop, stating at that time that she was ill and did not have funds to pay for the soda.

On May 29, 2011, Ms. Tatman had reported to her supervisor that she was not feeling well. Shortly after obtaining the soft drink in question, the claimant was authorized to leave for the day. The following day Ms. Tatman returned to work and was discharged after a meeting with management. Company policy requires that all items that are to be consumed must be

purchased in advance of their consumption and employees must obtain a receipt for all purchases.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes sufficient misconduct to warrant the denial of unemployment insurance benefits. 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.

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 insurance benefits. Misconduct serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant a denial of unemployment insurance 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).

In this matter the testimony is disputed. The administrative law judge having heard the testimony of the witnesses and having considered the matter concludes that the employer has sustained its burden of proof in establishing job disqualifying misconduct.

Ms. Tatman was discharged after she had taken a glass of soda from the company's dining area specifically stating to the cashier on duty that she would not be paying for the soda pop or for items that she might later consume that day. Ms. Thome, the employer's witness, testified with specificity as to the statements made by Ms. Tatman on the day in question expressing the claimant's intention not to pay for the soda or for items later to be consumed. Ms. Tatman did not pay for the items nor receive a receipt as required by company policy and the claimant did not inform her immediate supervisor of any extenuating circumstances surrounding the incident prior to leaving employment that day. Company employees are aware of the rule that requires them to pay for items to be consumed and to obtain a receipt and are aware that they are subject to discharge for failing to follow the rule. Unemployment insurance benefits are withheld.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

DECISION:

The representative's decision dated June 21, 2011, reference 01, is reversed. The claimant is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount and meets

all other eligibility requirements of Iowa law. The issue of whether the claimant must repay the unemployment benefits is remanded to the UIS Division for determination.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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