

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SCOTT A REISTROFFER
Claimant

APPEAL NO. 09A-UI-02989-E2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 01/2509
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated February 16, 2009, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on March 19, 2009. Claimant participated personally and with his attorney, Steven Kahler. Employer participated by Daniel Speir, as representative, and Denny Hartogh, Lois Denlinger, Michelle Palm and Steve Ruggeberg, witnesses.

ISSUE:

The issue in this matter is whether claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant last worked for employer on January 27, 2009. The claimant was a part-time night stock clerk.

Claimant was discharged on January 26, 2009 by the employer because he was accused of unlawful removal of store property; taking and eating food without paying for it in violation of company policy. Lois Denlinger was in the break room with the claimant at approximately 3:00 a.m. on January 23. She stated the claimant was eating a salad and another employee, Michael Kohl, was also eating food from the store and did not have a receipt showing. She did not ask the claimant about this. She did not remember what the other employee was eating. She initially testified this incident happened on January 16, 2009. She later corrected her testimony to state the incident took place on January 23, 2009. Ms Denlinger went out of the break room and asked the other employees working as cashiers, Michelle Palm and Steve Ruggeberg, if the claimant had checked out and paid for any food. The answer was no. Steve Ruggeberg, Night Manager, went to the break room. He did not see the claimant or Mr. Kohl eating any salads or vegetables. He looked in the garbage in the break room and found an empty salad container and a small empty tray that held vegetables. He took them out and left them for the store manager the next morning. Mr. Ruggeberg sent the claimant downstairs and told him to leave the store. The claimant told Mr. Ruggeberg he would pay for the salad. The

claimant did not admit he had taken food without paying for it. Denny Hartogh, Store Manager, investigated the matter the next day. He spoke to the claimant. He had the empty salad container and vegetable tray. He also testified he looked in the garbage and found a full salad with a unexpired code date. The claimant and Mike Kohl were sent out of the break room by Mr. Ruggeberg. Mr. Ruggeberg took the salad and tray out of the garbage. Mr. Hartogh found an additional salad in the trash after the claimant no longer had access to the room. The claimant and Mike Kohl had a pop in the break room at 3:00 a.m.

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 question is whether the evidence in the record establishes that Mr. Reistroffer was discharged for intentional misconduct in connection with the employment. It does not.

The evidence in the record establishes that the claimant was discharged based upon the employer's belief that the claimant had violated a company rule relating taking food. The testimony of Ms. Denlinger is less credible than that of the claimant. She was not sure of the date that the incident took place and could not remember what Mr. Kohl was eating. She did not mention to the claimant she suspected he had not paid for his food. The fact that Mr. Hartogh found an additional salad that Mr. Ruggeberg did not find when he went through the trash supports the claimant's version that someone else was putting the salad and vegetables in the trash in the break room.

Based upon the hearing record, the administrative law judge concludes that intentional disqualifying misconduct on the part of the claimant has not been shown.

DECISION:

The decision of the representative dated February 16, 2009, reference 01, is reversed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

James Elliott
Administrative Law Judge

Decision Dated and Mailed

jfe/css