

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHAD A CLARK
Claimant

APPEAL NO. 13A-UI-05885-VS

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 04/28/13
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed an appeal from a representative's decision dated May 13, 2013, reference 01, which stated that the claimant was eligible for unemployment insurance benefits. After due notice, an in-person hearing was held on August 6, 2013, in Cedar Rapids, Iowa. The claimant participated personally. The claimant was represented by Corey Luedeman, attorney at law. The employer participated by Wade Chalstrom, store director; Khetyn Kleppe, assistant manager; and Scott Sherwood, manager of perishables. Paul Jahnke served as hearing representative for the employer. The record consists of the testimony of Wade Chalstrom; the testimony of Khetyn Kleppe; the testimony of Scott Sherwood; the testimony of Chad Clark; claimant's exhibits A-K; and Employer's Exhibits 1-5.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a chain of retail food and drugs. The claimant worked at the store located in Marion, Iowa. He was hired on August 21, 2006. His actual last day of work was April 24, 2013. He was terminated on April 27, 2013. At the time of his termination he was the night stock manager. He was a full-time employee.

The incident that led to the claimant's termination occurred on April 24, 2013. Khetan Kleppe, an assistant manager, saw a package of Mike and Ike's candy sitting on a four wheel cart in what is known as the scanning room. She did not think anything of it at the time. Ms. Kleppe worked from 3:00 p.m. to closing, which is usually midnight. She went into the scanning room near the end of her shift to prepare an email summarizing what had been done that night. She then noticed that an empty Mike and Ike's candy box was in the waste basket. She thought this was unusual. One of the other employees told her that the claimant had consumed the candy. She mentioned the incident in her email.

Wade Chalstrom, the store director, asked the claimant to attend a meeting on April 27, 2013. He asked the claimant some general questions about honesty and ethics. The claimant said nothing about the candy. Mr. Chalstrom then asked the claimant if he had eaten a box of Mike and Ike's candy and the claimant admitted that he had done so. The candy box was partially crushed and the claimant thought it was damaged merchandise that could not be sold to the public. Staff members routinely would consume damaged product in the scanning room without paying for it. The product had to be consumed in the scanning office.

The employer has a written code of ethics. All product that is consumed by an employee must be paid for prior to consumption and a receipt readily available to confirm the purchase.

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.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. One of the most fundamental duties owed by an employee to an employer is honesty. The legal definition of misconduct excludes errors of judgment or discretion in isolated situations. The employer has the burden of proof to show misconduct.

The claimant is eligible for unemployment insurance benefits. While there is no question that the claimant consumed a package of candy without paying for it, the claimant credibly testified that the box was partially crushed. It was also in a location where damaged products were customarily found. The claimant was under the impression, based on actual experience, that it was permissible to consume damaged items so long as the product was eaten in the scanning room. There was no specific written policy contained in the employer's work rules that addressed the consumption of damaged items. The administrative law judge concludes that the claimant did not know that the employer would terminate him for eating product that he thought was going to be thrown away. At best the evidence shows an error of judgment or discretion in an isolated instance. This is not misconduct. Benefits are allowed provided the claimant meets all other eligibility requirements.

DECISION:

The decision of the representative dated May 13, 2013, reference 01, is affirmed. Unemployment insurance benefits are allowed, if the claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs