

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**TIMOTHY W NUTTING**

Claimant

**APPEAL NO. 10A-UI-08246-CT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OFFICEMAX NORTH AMERICA INC**

Employer

**OC: 05/02/10**

**Claimant: Respondent (2-R)**

Section 96.5(2)a – Discharge for Misconduct  
Section 96.3(7) – Recovery of Overpayments

**STATEMENT OF THE CASE:**

OfficeMax North America, Inc. filed an appeal from a representative's decision dated June 1, 2010, reference 01, which held that no disqualification would be imposed regarding Timothy Nutting's separation from employment. After due notice was issued, a hearing was held by telephone on July 27, 2010. Mr. Nutting participated personally. The employer participated by Debra Pullins, Field Loss Prevention Manager, and Jeff Kunkle, Store Manager.

**ISSUE:**

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

**FINDINGS OF FACT:**

Having heard the testimony and having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Nutting was employed by OfficeMax from September 29, 2008 until April 29, 2010 as a full-time assistant manager. The employer has a written policy that prohibits merchandise from being removed from the store without payment having been made. Mr. Nutting was discharged because he consumed a bottle of pop without paying for it.

Jeff Kunkle was reviewing surveillance tapes on or about April 23 to try to determine why Mr. Nutting had not been very productive that day. He observed Mr. Nutting leave the office, get a bottle of pop from the cooler, and return to the office without paying for it. A short time later he left the office again but still did not pay for the bottle of Sprite. During the investigation by loss prevention, Mr. Nutting stated that he usually places his receipt under his bottle of pop so that he has proof of payment. When he finishes the pop, he throws the receipt and the container away. On this occasion on April 23, he threw the bottle away when he finished the pop but still did not make payment.

After the investigation was completed by loss prevention, Mr. Nutting was discharged for theft. The above incident was the sole reason for his discharge on April 29, 2010. He filed a claim for job insurance benefits effective May 2, 2010. He has received a total of \$4,488.00 in benefits since filing the claim.

## **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). Mr. Nutting was discharged for theft. He did, in fact, consume a bottle of Sprite without paying for it. He made no effort to pay for the pop at any point during his shift. If he was not going to have the time to pay for it when he initially got it because he thought the store was busy, his recourse was to delay getting the pop. He also could have made payment for it when he came back out of the office to assist with customers on the sales floor.

The administrative law judge has also considered Mr. Nutting's usual practice of putting his receipt under the pop bottle so that he had proof of payment. Given this practice, he had to have known when he finished the pop that he had not yet made payment because there was no receipt under the bottle. Rather than retaining the bottle as a reminder to make payment, he threw the bottle away. Given the totality of the circumstances, the administrative law judge concludes that Mr. Nutting deliberately and intentionally consumed a bottle of pop without making payment and without intending to make payment. His conduct constituted theft, which is clearly contrary to the type of behavior an employer has the right to expect. Although the value of the item taken was relatively minor, the fact remains that it was property of value that belonged to the employer. For the reasons cited herein, it is concluded that disqualifying misconduct has been established. Accordingly, benefits are denied.

Mr. Nutting has received benefits since filing his claim. Based on the decision herein, the benefits received now constitute an overpayment. As a general rule, an overpayment of job insurance benefits must be repaid. Iowa Code section 96.3(7). If the overpayment results from the reversal of an award of benefits based on an individual's separation from employment, it may be waived under certain circumstances. An overpayment will not be recovered from an individual if the employer did not participate in the fact-finding interview on which the award of benefits was based, provided there was no fraud or willful misrepresentation on the part of the individual. This matter shall be remanded to Claims to determine if benefits already received will have to be repaid.

## **DECISION:**

The representative's decision dated June 1, 2010, reference 01, is hereby reversed. Mr. Nutting was discharged by OfficeMax for misconduct in connection with his employment. Benefits are denied until he has worked in and been paid wages for insured work equal to ten times his weekly job insurance benefit amount, provided he is otherwise eligible. This matter is remanded to Claims to determine the amount of any overpayment and whether Mr. Nutting will be required to repay benefits.

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Carolyn F. Coleman  
Administrative Law Judge

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Decision Dated and Mailed

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