

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**KEITH T KIMMEN**  
Claimant

**APPEAL NO. 10A-UI-07012-VST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**HY-VEE INC**  
Employer

**OC: 04/11/10**  
**Claimant: Appellant (1)**

Section 96.5-2-A -- Misconduct

**STATEMENT OF THE CASE:**

Claimant filed an appeal from a decision of a representative dated May 3, 2010, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on July 1, 2010. Claimant participated. Employer participated by Chris Bryant, Store Director. The employer was represented by Judith Schulte, Attorney at Law. The record consists of the testimony of Chris Bryant; the testimony of Keith Kimmen; and Employer's Exhibits 1-3.

**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 owns and operates a grocery store, pharmacy, and wine and spirits shop in Harlan, Iowa. The claimant was hired on May 23, 2007. He was the assistant manager of the wine and spirits shop. His last day of work was March 29, 2010. He terminated on that date for what the employer determined to be unauthorized removal of store property.

On March 13, 2010, the store director, Chris Bryant, was asked by another manager to telephone a customer. The customer informed Mr. Bryant that the claimant was giving tobacco and alcohol products to customers without taking payment and that the claimant was also taking items himself. Mr. Bryant commenced an investigation and as part of that investigation, reviewed surveillance video from the wine and spirits shop. The tape from March 16, 2010, showed the claimant putting an item, possibly a pack of cigarettes in a paper sack. The claimant was then observed placing the sack under his arm and then leaving out the side door where the employee cars are parked. He returned without the sack.

The surveillance video from March 20, 2010, showed the claimant taking sacks out the side door. At 10:45 a.m. a customer brings up a 24 or 30 pack of beer and the claimant is also seen

on the phone, as well as taking down a pack of cigarettes. The customer puts down some money and takes the merchandise. The claimant does not ring up the purchase on the register.

Mr. Bryant then contacted Bonnie Bell, who works with safety and security for the employer. She reviewed the tapes and still photographs of the claimant. She decides that the claimant should be interviewed. Ms. Bell and Mr. Bryant interviewed the claimant on March 29, 2010. The claimant signed a statement saying that he had taken merchandise from the store on occasion and that he estimated he owed \$250.00. (Exhibit 3) Mr. Bryant made the decision then to terminate the claimant.

## **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 disqualifies an individual from receiving unemployment insurance benefits 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 a worker to his or her employer is honesty. An employer can reasonably expect that an employee will not take merchandise or property of the employer without paying for that merchandise. The employer has the burden of proof to show misconduct.

The evidence in this case established that the claimant did take property belonging to the employer without paying for it. The claimant admitted in his testimony that he had consumed

beverages and food items. He called it "grazing" and said that other employees had done this as well. Although he denied having removed any items from the store, the surveillance video strongly suggested otherwise. The claimant admitted that he signed a statement that he had taken merchandise from the store, but testified that he signed the statement under duress since his father-in-law was ill at the time. Even if that is true, the claimant still admitted in his testimony at the hearing that he had taken merchandise without paying for it. The claimant said he has no idea on the amount, but regardless of the amount, he did take misappropriate company property. Theft of company property is misconduct. Benefits are denied.

**DECISION:**

The decision of the representative dated May 3, 2010, reference 01, is affirmed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible.

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Vicki L. Seeck  
Administrative Law Judge

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Decision Dated and Mailed

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