

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JACKIE L WATERS
Claimant

APPEAL NO. 09A-UI-18914-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 11/22/09
Claimant: Respondent (2-R)

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

STATEMENT OF THE CASE:

Hy-Vee, Inc. filed an appeal from a representative's decision dated December 11, 2009, reference 01, which held that no disqualification would be imposed regarding Jackie Waters' separation from employment. After due notice was issued, a hearing was held by telephone on February 17, 2010. Ms. Waters participated personally. The employer participated by Kim Burrell, Kitchen Manager, and Tom Noll, Human Resources Manager. The employer was represented by Derek Holland of Unemployment Insurance Services.

ISSUE:

At issue in this matter is whether Ms. Waters 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: Ms. Waters was employed by Hy-Vee, Inc. from May 12, 2008 until November 10, 2009. She was employed full time as a kitchen clerk. She was discharged due to theft.

Ms. Waters reported to work on November 8, clocked in, and went directly to the health and beauty department. She took a bottle of Vivarin, valued at \$9.99, off the shelf and took it with her to the kitchen. She took some of the tablets and placed the bottle on a shelf behind one-gallon jugs of ketchup. She then left to take care of a catering job off site. She returned to the store after the event. She made no attempt to pay for the Vivarin between the time she took it off the shelf and when she left for the day on November 8.

The kitchen manager found the bottle of tablets and questioned other kitchen staff about it. Another employee called Ms. Waters, who then called the kitchen manager and admitted to taking the Vivarin without making payment. She indicated she had left her wallet in her car and had been in a hurry. The employer has zero tolerance for theft and, therefore, Ms. Waters was discharged on November 10, 2009. The above matter was the sole reason for the separation.

Ms. Waters filed a claim for job insurance benefits effective November 22, 2009. She has received a total of \$3,133.00 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). Ms. Waters was discharged because of theft. She was aware of the employer's work rule that required merchandise to be paid for before consumption. She knew after she took the merchandise off the shelf that she did not have her wallet with her and, therefore, could not make payment. Rather than replacing the item on the shelf or going to her car to get money, she took the Vivarin to the kitchen. She did not speak to any manager to see if she could make payment later due to being in a hurry. Ms. Water consumed some of the Vivarin as if she had made payment.

Ms. Waters did not attempt to make payment for the Vivarin when she returned to the store later in the day on November 8. It was not until the kitchen manager began asking others about the bottle of Vivarin on the shelf that Ms. Waters acknowledged that she had taken it. Most persuasive in this matter is the fact that she took the Vivarin with her in spite of knowing that she was not going to make payment at that time. The fact that the bottle was placed behind larger items on the shelf suggests that she had no intention of making payment at any future point. For the reasons cited herein, the administrative law judge concludes that the employer has established theft, which is clearly contrary to the type of behavior an employer has the right to expect. As such, benefits are denied.

Ms. Waters has received benefits since filing her 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 December 11, 2009, reference 01, is hereby reversed. Ms. Waters was discharged for misconduct in connection with her employment. Benefits are denied until she has worked in and been paid wages for insured work equal to ten times her

weekly job insurance benefit amount, provided she is otherwise eligible. This matter is remanded to Claims to determine the amount of any overpayment and whether Ms. Waters will be required to repay benefits.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/pjs