IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

KYLE P DOWIE
Claimant

HY-VEE INC
Employer

APPEAL NO. 11A-UI-15366-L

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/30/11
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant, Kyle Dowie, filed a timely appeal from the November 23, 2011 (reference 01) decision that denied benefits. After due notice was issued, a hearing was held on January 17, 2012 in Des Moines, Iowa. Dowie participated with his mother, Jeananne Johnson, who also acted as his representative. Employer, Hy-Vee, participated through Manager of Store Operations Curt Sills and Assistant Manager of Store operations Andrew Blize, and was represented by independent hearing representative Paul Jahnke for Hy-Vee and its agent Corporate Cost Control, Inc.

ISSUE:

Was the Dowie discharged for reasons related to job misconduct sufficient to warrant a denial of benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Dowie was employed as a full-time bottle return area clerk at the Urbandale Hy-Vee from September 9, 1986 through November 2, 2011, when he was discharged. Dowie graduated from high school in May 1987. The Weschler Adult Intelligence Scale conducted at the time measured his full scale IQ at 67, which Johnson described as falling within the "mentally retarded" range. His comprehension and cognitive ability age is at 14 or younger. He has short- and long-term memory problems and is unable to remember details of events. He sometimes agrees with people when questioned regardless of whether his response is accurate. Dowie was responsible for maintaining the can and bottle redemption area at Hy-Vee and Sills praised how he was "meticulous" about performing his job, remembering to pick up trash, and keeping the area clean. Dowie functions at home and work by adherence to a daily routine, but Sills also gave him daily reminders about his cleaning and outside job duties. Hy-Vee provided him with performance reviews annually and those dating to 2009 all were rated "very good." Others after 2009 were missing or not available. According to informal verbal policy, employees who find unredeemed can/bottle receipts printed by the Hy-Vee machines are supposed to turn them over to a manager or customer service because the employer treats the receipts as cash. There is no policy about when an employee may redeem the receipts. Regularly, but not daily,

Dowie brought cans and bottles from home, which he gathered from his sister and mother and others, put them into the machine, and cashed in the receipts. Most often the receipts he redeemed were printed from machines at the Urbandale Hy-Vee location; sometimes the receipts were from other Hy-Vee stores.

After clocking in on November 2 he pulled multiple bottle redemption receipts from his pocket and presented them to a cashier in exchange for $3.95 in cash. Sills observed the transaction and questioned him. Dowie admitted to Sills that some of the receipts were his and some were not but did not recall where he got them. All but two of the receipts were dated November 2 and were from cans and bottles he brought with him from home and had put into the redemption machines that morning. He also had two receipts dated October 30 and November 2, 2011 in his pocket that he had not given to the cashier. At issue are two ten-cent bottle receipts from the Urbandale Hy-Vee dated September 1, 2011 and September 21, 2011. Sills asked him if he knew the difference between right and wrong, if he drank that much pop or was collecting cans, and if he had gone to other stores turning in bottle receipts. Dowie denied this and was upset about being accused of going to another store to turn in receipts even though the practice is not prohibited. When questioned by the administrative law judge (ALJ) at hearing, Dowie remembered only that the receipts came from his pocket and before they were in his pocket at the store, the receipts were at home and he put them in his pocket. No customers reported they were missing bottle receipts. There are no surveillance cameras in the bottle return area and Hy-Vee does not have any independent evidence, apart from Dowie's purported admission, that the receipts were not his.

Dowie had no recollection of prior warnings or that Hy-Vee was not happy with how he handled bottle receipts. He thought he probably had received a handbook when he was hired but had no other recollection of receiving a handbook. The most recent handbook receipt is dated June 3, 2010. Dowie had no memory of having been warned most recently on June 26, 2003 when he allegedly turned in receipts for customers. The employer also warned him on February 7, 1998, when he was accused of taking cans from a back room and cashing in the receipts; and on September 24, 2001, when he turned in receipts for cash that were reportedly not his. Johnson visited with Assistant Manager Cisco Oakley and Sills regularly about how the family could help Hy-Vee with any concerns and assist Dowie to better perform his job.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes Dowie was discharged from employment for no disqualifying reason.

Iowa Code § 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:
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> 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.
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> 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 employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

In an at-will employment environment, an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job-related misconduct as the reason for the separation, the employer incurs potential liability for unemployment insurance benefits related to that separation. Theft from an employer, regardless of amount, is misconduct. Hy-Vee is one of the state's largest employers and if every employee took 20 cents in one form or another, even on one occasion, the amount would be substantial; much like a leaking faucet. One drip may seem insubstantial but the cumulative effect is significantly detrimental to the annual water bill. However, Hy-Vee has not established any independent evidence, apart from Dowie's ostensible admission, that the two ten-cent receipts from September 1 and 21, 2011 were not his. Since Dowie's memory and cognition are clearly deficient and he is susceptible to suggestion because of his intellectual disability, his statement to Sills that the two ten-cent receipts from a month and a half and two months earlier were not his, as the basis for the separation, is not credible. His statement to the ALJ that the receipts were at home and then were placed into his pocket is believable. Since neither party is able to credibly explain where the receipts came from before that, the ALJ concludes the receipts belonged to Dowie and the employer has failed to meet its burden of proof that he engaged in misconduct by exchanging them for cash. Benefits are allowed.

DECISION:

The November 23, 2011 (reference 01) decision is reversed. Dowie was discharged from employment for no disqualifying reason. Benefits are allowed. The benefits withheld shall be paid, provided the he is otherwise eligible.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/kjw