

**IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI**

**NICHOLAS A BROCK
3045 FOURTH AVE
MARION IA 52302**

**PEPSI-COLA GENERAL BOTTLERS INC
c/o TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283**

**Appeal Number: 04A-UI-02933-RT
OC: 02-15-04 R: 03
Claimant: Respondent (2)**

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Pepsi-Cola General Bottlers, Inc., filed a timely appeal from an unemployment insurance decision dated March 10, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Nicholas A. Brock. After due notice was issued, a telephone hearing was held on April 6, 2004 with the claimant participating. Shawn Powers, Human Resources Generalist, and Eric Walker, On Premises Territorial Sales Manager, participated in the hearing for the employer. The employer was represented by Joyce Habel of TALX UC eXpress. Employer's Exhibit 1 and Claimant's Exhibit A were admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

On March 22, 2004 at 3:30 p.m., the administrative law judge spoke to the claimant. The claimant initially requested that the hearing be rescheduled because he had another job. However, the claimant stated that he could conduct the hearing by cell phone and therefore the administrative law judge did not reschedule the hearing. The claimant participated in the hearing.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibit 1 and Claimant's Exhibit A, the administrative law judge finds: The claimant was employed by the employer as a tel-sell driver from January 23, 2001 until he was discharged on February 18, 2004 for the manipulation of cases of merchandise or product that was outdated or close to outdated. The employer has a policy in its general rules of conduct in group 4, letter O, as shown at Employer's Exhibit 1, prohibiting the manipulation of cases of merchandise between any employee or employees and customers for any purpose without specific authorization from a supervisor. The claimant received a copy of the general rules of conduct, signed an acknowledgement therefor, and was aware, at all materials times hereto, of the rule or policy.

On February 4, 2004, the claimant took six cases of outdated product from the vending machine for the City of Manchester, Iowa, and sold it to the Cork & Bottle for \$5.00 per case. The claimant initiated contact with Doug Gehl about getting rid of the product and Mr. Gehl approved. However, the City of Manchester vending machine was one of the claimant's accounts and was not an account for Mr. Gehl and further the claimant did not report to him but rather reported to Eric Walker, On Premises Territorial Sales Manager and one of the employer's witnesses. The claimant did not inform Mr. Walker of what he was doing with the six cases of out-of-date product, even though the claimant talked to Mr. Walker everyday. All outdated product is supposed to be returned to the employer's facilities for destruction. The employer has such rules because it is important to the employer's reputation for its product to always be current and "in code." The claimant is charged \$7.00 per case for outdated product that is returned. On previous occasions, January 25, 2003 and June 18, 2003, the claimant was told by Mr. Gehl to take outdated product and sell it. However, these were accounts of Mr. Gehl. Mr. Walker was not aware of these. The employer became aware of all of these incidents on February 4, 2004 and after an investigation the claimant was discharged. Mr. Gehl was likewise discharged. There were no other reasons for the claimant's discharge.

Pursuant to his claim for unemployment insurance benefits filed effective February 15, 2004, the claimant has received unemployment insurance benefits in the amount of \$600.00 as follows: \$300.00 per week for two weeks, benefit weeks ending February 28, 2004 and March 6, 2004. For benefit week ending February 21, 2004, the claimant received no benefits reporting vacation pay sufficient to nullify benefits.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was.
2. Whether the claimant is overpaid unemployment insurance benefits. He is.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer's witnesses credibly testified that the employer has a very clear and specific policy in its general rules of conduct contained at Employer's Exhibit 1 prohibiting the manipulation of cases of product or merchandise between an employee and customers for any purpose without authorization from a supervisor. The employer's witnesses also credibly testified that on February 4, 2004, the claimant took six cases of outdated product from the vending machine for the City of Manchester and, instead of returning it to the employer's facilities for destruction as appropriate, the claimant took the outdated product to the Cork & Bottle and sold it for \$5.00 per case. The claimant concedes that he did so but justifies his actions by stating that Doug Gehl, an account manager, told him to do so. However, the City of Manchester vending machine was on the claimant's account and not on the account of Mr. Gehl and the claimant did not report to Mr. Gehl but rather reported to Eric Walker, On Premises Territorial Sales Manager. The claimant did not inform Mr. Walker of this even though he

spoke to Mr. Walker daily. When asked why the claimant did not inform Mr. Walker, the claimant had no real reason merely stating that claimant went to Mr. Gehl instead. The claimant later said that others were doing the same thing and he assumed that it was acceptable and Mr. Gehl had led him to believe that it was. However, the claimant concedes that he was aware of the employer's policy prohibiting such manipulation and aware that outdated product should be returned to the employer for destruction. The employer is most concerned about its reputation and demands that its product be current and "in code." The claimant sold the cases because if he did not he would be charged \$7.00 per case by the employer for the outdated product. The claimant knew that this sale was a manipulation of the product. The administrative law judge believes that the claimant did not contact Mr. Walker because he knew what he was doing was wrong. There were two other incidents where the claimant did the same thing but sold the product from Mr. Gehl's account and these were not initiated by the claimant. The claimant initiated the sale of the six cases from the City of Manchester vending machine.

Although the claimant had received no warnings or disciplines for this behavior, the administrative law judge is constrained to conclude that because the claimant was aware of the policy and knew that his sale was manipulation and knew that it was prohibited that his act was a deliberate act constituting a material breach of his duties and obligations arising out of his worker's contract of employment and evinces a willful or wanton disregard of the employer's interests and is, at the very least, carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. The administrative law judge does not believe that it is a defense that he was told to do this or this was approved by Doug Gehl, an account manager, because the claimant did not report to Mr. Gehl but reported to Mr. Walker and did so daily but never consulted Mr. Walker. The administrative law judge also does not believe that it is a defense or justification that others were doing it. The claimant knew it was wrong and did it anyway.

Accordingly, and for all the reasons set out above, the administrative law judge concludes that claimant's acts were disqualifying misconduct, and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he requalifies for such benefits.

Iowa Code Section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$600.00 since separating from the employer herein on or about February 18, 2004 and filing for such benefits effective February 15, 2004 to which he is

not entitled and for which he is overpaid. The administrative law judge further concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of March 10, 2004, reference 01, is reversed. The claimant, Nicholas A. Brock, is not entitled to receive unemployment insurance benefits until or unless he requalifies for such benefits. He has been overpaid unemployment insurance benefits in the amount of \$600.00.

tjc/b