

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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**MICHAEL S MCGUIRE**  
Claimant

**HY-VEE INC**  
Employer

**APPEAL NO. 18A-UI-09173-B2T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 08/12/18  
Claimant: Appellant (1)**

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Iowa Code § 96.5-2-a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Claimant filed an appeal from a decision of a representative dated August 27, 2018, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on September 20, 2018. Claimant participated personally. Employer participated by hearing representative Lisa Harroff, and witnesses Julie Headley, Joe Stupke and Matt Hickok. Employer's Exhibits 1-7 were admitted into evidence.

**ISSUE:**

The issue in this matter is whether claimant was discharged for misconduct?

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant last worked for employer on August 4, 2018. Employer discharged claimant on August 4, 2018 because claimant had taken a can of Pringles and eaten the can while working without having paid for the item, in violation of employer's Code of Conduct.

Claimant worked for employer for 20 years. Until the last week of his employment, claimant had worked as an assistant manager for general merchandise. Claimant was demoted on July 27, 2018 to a general merchandise clerk as a result of not properly executing the duties of assistant manager after warnings.

On July 27, 2018, employer was attempting to find claimant to have him come to a meeting to demote him from his position. Claimant was found near the damaged items eating from a Pringles container. Claimant admitted he did not pay for the chips that he was eating. Claimant stated that the chips were damaged, and that he picked them up from an area near the damaged products area and the trash. Claimant stated that he then ate the chips, as he often did. Claimant was found eating the chips by an assistant manager between pallets located in the back of the store. Claimant was confronted on August 4, 2018 about the incident. Claimant admitted eating the chips and said that they came from a damaged can. Claimant, who'd worked for employer for 20 years, stated that he'd done this at each Hy-Vee where he'd worked.

Employer stated that the rules regarding damaged food were well known by all employees. They stated that the Code of Conduct, which was received by claimant, indicates that dishonesty will be grounds for instant dismissal and can mean taking food without paying for it first. Claimant knowingly took food without paying for it first. Claimant admitted to doing this and also stated that he did not do anything to remove the item from inventory prior to eating the chips.

Employer stated that to allow employees to eat food in damaged packaging would almost amount to encourage employees to damage packaging or to determine many items to be damaged, as that would allow larger choices of food to select. In either event, employer's profits are diminished through employees' eating of foods without paying for them.

### **REASONING AND CONCLUSIONS OF LAW:**

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer

has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982), Iowa Code § 96.5-2-a.

In order to establish misconduct as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. Rule 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa Ct. App. 1986). The conduct must show a 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 the employee's duties and obligations to the employer. Rule 871 IAC 24.32(1)a; *Huntoon supra*; *Henry supra*. In contrast, 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 deemed misconduct within the meaning of the statute. Rule 871 IAC 24.32(1)a; *Huntoon supra*; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

The employer bears the burden of proving that a claimant is disqualified from receiving benefits because of substantial misconduct within the meaning of Iowa Code section 96.5(2). *Myers*, 462 N.W.2d at 737. The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. Because our unemployment compensation law is designed to protect workers from financial hardships when they become unemployed through no fault of their own, we construe the provisions "liberally to carry out its humane and beneficial purpose." *Bridgestone/Firestone, Inc. v. Emp't Appeal Bd.*, 570 N.W.2d 85, 96 (Iowa 1997). "[C]ode provisions which operate to work a forfeiture of benefits are strongly construed in favor of the claimant." *Diggs v. Emp't Appeal Bd.*, 478 N.W.2d 432, 434 (Iowa Ct. App. 1991).

For the purposes of this decision, it will be accepted claimant ate Pringles from a damaged package. Employer offered no evidence to say that the chip sleeve was not damaged, and the damage or lack of damage of the container is not relevant to the decision of the administrative law judge.

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa Ct. App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *State v. Holtz, Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz, Id.* In this matter, the credibility or lack thereof of claimant looms large. Claimant asks that the administrative law judge believe that he had no idea that he was not to eat items which had been placed aside to be removed from inventory and then thrown away. After working for a store for decades, this statement is not credible. Claimant knew of store procedures and certainly knew of the close

inventory counts kept by his employer. Claimant knew of the store's procedure for getting rid of damaged items. Claimant admitted he had no idea whether the items had or had not been removed from inventory. Absent this knowledge, claimant unquestionably took an item that was still in the store's inventory and ate that item without paying for it. With this knowledge, claimant inescapably knew that the snacking of store items for which he'd not paid (even though he'd done it hundreds of times) would be financially detrimental to employer's bottom line.

In this matter, the evidence established that claimant was discharged for an act of misconduct when claimant violated employer's policy concerning theft of items from the store. The last incident, which brought about the discharge, constitutes misconduct because claimant knew or certainly should have known that taking and eating items from the store's inventory was absolutely forbidden. The administrative law judge holds that claimant was discharged for an act of misconduct and, as such, is disqualified for the receipt of unemployment insurance benefits.

**DECISION:**

The decision of the representative dated August 27, 2018, 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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Blair A. Bennett  
Administrative Law Judge

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Decision Dated and Mailed

bab/scn