

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHRISTINE A SORTER
Claimant

APPEAL NO. 08A-UI-07571-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 07/20/08 R: 02
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 August 18, 2008, reference 01, which held that no disqualification would be imposed regarding Christine Sorter's separation from employment. After due notice was issued, a hearing was held by telephone on September 4, 2008. Ms. Sorter participated personally. The employer participated by Jeff Moore, Assistant Manager; Lydia McGee, Human Resources Manager; Matt Rebik, Assistant Kitchen Manager; and Rudy Morales, Loss Prevention Officer. The employer was represented by Tim Speir of Unemployment Insurance Services.

ISSUE:

At issue in this matter is whether Ms. Sorter was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all of the evidence in the record, the administrative law judge finds: Ms. Sorter was employed by Hy-Vee, Inc. from November 2, 2007 until July 22, 2008. She worked from 35 to 40 hours each week as a kitchen clerk. On July 21, Rudy Morales watched as another employee rang up purchases for Ms. Sorter at the register in the kitchen. After the transaction, all of the items that had been in the shopping basket were placed in an area where employees usually leave personal items such as purses and coats. Some of the items were placed in grocery bag. Ms. Sorter's coworker had placed some of the items in her own purse. Mr. Morales did not believe all of the items in the shopping basket had been scanned into the register and, therefore, contacted Jeff Moore. Mr. Moore viewed the details from the register and determined that only two items had been rung up. Ms. Sorter paid \$4.12 for a shower lotion and douche. Mr. Morales had noted that there had been a package of disposable diapers in Ms. Sorter's shopping basket

Mr. Moore advised Matt Rebik, the kitchen manager, that he suspected Ms. Sorter and her coworker intended to remove merchandise from the store without paying for it. Mr. Rebik was told the employer intended to check their packages when they left work that evening. Mr. Rebik

alerted the two to the fact that the employer knew they had items behind the counter that had not been paid for. He directed them to either pay for the items or return them to the shelves. Ms. Sorter's coworker returned her items to the shelves as directed. The employer's cash register records reflect a package of Pampers being purchased on July 21 at 7:34 p.m. at the kitchen register. There were only three clerks working in the kitchen area during that shift. The Pampers were the only items purchased during the transaction for a total of \$22.24, which was paid in cash. Mr. Rebik witnessed Ms. Sorter making the purchase.

The employer questioned Ms. Sorter on July 22 concerning her actions of July 21. She told the employer she had placed items behind the counter because her mother intended to come in and purchase the items for her at a later time. As a result of the conduct of July 21, both Ms. Sorter and her coworker were discharged on July 22, 2008. The above matter was the sole reason for the separation.

Ms. Sorter filed a claim for job insurance benefits effective July 20, 2008. She has been paid a total of \$785.00 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. Sorter was discharged for dishonesty. She did not remove any merchandise from Hy-Vee without first making payment. However, the administrative law judge is persuaded by the evidence that she intended to remove items without payment.

The parties do not dispute the fact that there was a package of disposable diapers behind the counter in the kitchen or that it was placed there by Ms. Sorter before making payment. She contended that she did not have enough money to pay for the diapers when she purchased the other items and that she placed the diapers behind the counter so that her mother could purchase them for her later. She further contended that her mother did, in fact, come in and purchase the diapers for her but did not pay for them at the kitchen register.

The administrative law judge is more inclined to believe Ms. Sorter purchased the diapers herself approximately one hour after being told management intended to check her parcels. The employer's records reflect the purchase of Pampers at the kitchen register at 7:34 p.m. on July 21. It seems unlikely that an unrelated customer would pay for disposable diapers at the kitchen register when that was the only item being purchased and that this purchase would occur on the same day and near the same time Ms. Sorter had disposable diapers she had not paid for behind the counter. The administrative law judge is more inclined to believe that it was Ms. Sorter who purchased the diapers at the kitchen register as testified by Matt Rebik.

If Ms. Sorter was able to purchase the diapers at 7:34 p.m. with cash, the administrative law judge must conclude that she had the funds available to pay for them when she paid for her earlier purchases. Having taken the position that her mother paid for the diapers later, Ms. Sorter did not contend that she, herself, was able to purchase the diapers later because someone brought her money to do so. Since she did not pay for all items at the same time, it must be concluded that she intended to remove the diapers without making payment. The administrative law judge appreciates that Ms. Sorter did, in fact, pay for the diapers before she left work. However, attempted theft from one's employer is as substantial an act of misconduct as actual theft. The fact that an individual was caught before completing the theft does not make the conduct less of a disregard of the employer's standards.

After considering all of the evidence, the administrative law judge concludes that Ms. Sorter intended to remove merchandise from her employer without paying for it and that such conduct is clearly contrary to the type of behavior an employer has the right to expect. For the reasons cited herein, it is concluded that disqualifying misconduct has been established by the evidence. Accordingly, benefits are denied.

Ms. Sorter has received \$785.00 in job insurance benefits since filing her claim. Based on the decision herein, the benefits received now constitute an overpayment. As a general rule, an overpayment of benefits must be repaid. Iowa Code section 96.3(7). However, when an individual is awarded benefits on a separation issue and that award is later reversed on appeal, the resulting overpayment may be waived under certain circumstances. The overpayment may be waived if the claimant did not make any fraudulent statements during the fact-finding interview that resulted in the award of benefits and the employer failed to participate in the fact-finding interview. This matter shall be remanded to Claims to determine if Ms. Sorter will be required to repay benefits.

DECISION:

The representative's decision dated August 18, 2008, reference 01, is hereby reversed. Ms. Sorter was discharged for misconduct in connection with her employment. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly job insurance benefit amount, provided she satisfies all other conditions of eligibility. This matter is remanded to Claims to determine if Ms. Sorter will be required to repay job insurance benefits.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/kjw