

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LORI L MARKLE
Claimant

APPEAL NO. 07A-UI-10523-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 05/20/07 R: 02
Claimant: Respondent (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.3(7) – Recovery of Overpayment

STATEMENT OF THE CASE:

Hy-Vee, Inc., filed a timely appeal from the November 6, 2007, reference 05, decision that allowed benefits. After due notice was issued, a hearing was held on November 30, 2007. Claimant Lori Markle participated. David Williams of TALX UC eXpress represented the employer and presented testimony through Store Director Mike Kueny, Assistant Manager Maria See and Perishables Manager Mike Bubon. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One through Four into evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies her for unemployment insurance benefits.

Whether the claimant has been overpaid benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Lori Markle was employed by Hy-Vee as a part-time kitchen clerk from May 8, 2007 until October 9, 2007, when Store Director Mike Kueny discharged her.

The final incident that prompted the discharge occurred on October 6, 2007. At approximately 9:00 p.m., Ms. Markle went through a checkout lane operated by Assistant Manager Maria See. At the time Ms. Markle went through the lane she had finished her shift, but had not clocked out. Ms. Markle was in the lane because she wanted to purchase some cigarettes. Ms. Markle had two Hy-Vee sacks in her possession. The sacks were tied shut. Ms. See asked Ms. Markle what was in the sacks. Ms. Markle told Ms. See that the sacks contained the remainder of her employee meal and some produce that another employee had given Ms. Markle for her rabbit. Ms. See reviewed the contents of the sacks. The sacks contained two quarts of prepared food from the employer's Chinese deli. The quantities of food in the containers, and the containers themselves, were inconsistent with an employee meal purchase and there was enough food to

feed several people. The sacks contained three pounds of grapes and one pound of peanuts in the shell. The employer stocked both of these items in its produce department. The sacks contained some loose lettuce that a salad bar employee had given to Ms. Markle for her rabbit. Ms. See asked Ms. Markle to produce a receipt for the alleged employee meal, but Ms. Markle did not have a receipt. The employer's written policy required employees to have the receipt for purchases with them or attached to the item purchased. Ms. Markle was aware of the policy. The store was busy at the time Ms. Markle came through Ms. See's checkout lane. Ms. See accused Ms. Markle of being a thief. Ms. Markle then offered to pay for the items. Ms. See told Ms. Markle that the food items would be taken to the managers' office. Ms. See directed Ms. See to leave the store immediately and to speak with Store Director Mike Kueny when she appeared for her next shift. Ms. Markle left the store without clocking out.

On October 9, Ms. Markle appeared at the store for her shift. Ms. Markle was summoned to a meeting with Store Director Mike Kueny and a Manager of Perishables, Mike Bubon. With regard to the Chinese food, Ms. Markle asserted that she had purchased a one quart container of the food as an employee meal at 4:37 p.m. on cash register number 27. The employer conducted a computer search of the transactions for that cash register for period of 2:00 p.m. to 6:00 p.m. and found no such transaction. Ms. Markle asserted that the grapes were given to her by a salad bar clerk and asserted that the grapes the salad bar clerk had given her had somehow been exchanged, without Ms. Markle's knowledge, for the "holiday grapes" the employer stocked in the produce department. Ms. Markle offered to pay for the grapes and did compensate the employer for the grapes. Ms. Markle denied knowledge of the peanuts. Ms. Markle did not have a receipt for the employee meal purchase, but told the employer that she might have the receipt for the employee meal at home.

Ms. Markle established an additional claim for benefits that was effective October 14, 2007 and received benefits totaling \$1,092.00.

REASONING AND CONCLUSIONS OF LAW:

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.

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

Iowa Code section 714.1(1) and (2) provide as follows:

714.1 Theft defined.

A person commits theft when the person does any of the following:

1. Takes possession or control of the property of another, or property in the possession of another, with the intent to deprive the other thereof.
2. Misappropriates property which the person has in trust, or property of another which the person has in the person's possession or control, whether such possession or control is lawful or unlawful, by using or disposing of it in a manner which is inconsistent with or a denial of the trust or of the owner's rights in such property, or conceals found property, or appropriates such property to the person's own use, when the owner of such property is known to the person.

The fact that a person has concealed unpurchased property of a store or other mercantile establishment, either on the premises or outside the premises, is material evidence of intent to deprive the owner, and if the person conceals or causes to be concealed unpurchased property, the finding of the concealed property is also material evidence of intent to deprive on the part of the person concealing the goods. See Iowa Code section 714.5.

The greater weight of the evidence in the record indicates that Ms. Markle knowingly and intentionally attempted to leave the workplace with merchandise she had not purchased. The merchandise belonged to the employer. After hearing and considering all of the evidence, the administrative law judge concludes that Ms. Markle's testimony is not credible. Ms. Markle's version of events just does not add up. The weight of the evidence persuades the administrative law judge that the presence of the "holiday grapes" and peanuts in Ms. Markle's shopping bag was attributable to the intentional conduct of Ms. Markle, rather than the result of a conspiracy to get her fired or a misunderstanding involving a salad bar clerk. The weight of the evidence indicates that the quantity of Chinese food in each container in the shopping bag was inconsistent with an employee meal purchase. The evidence indicates that Ms. Markle provided the employer with bogus purchase information, which the employer was quickly able to determine was in fact bogus. The weight of the evidence indicates that Ms. Markle's story about the alleged meal purchase evolved after the discharge and evolved further after the fact-finding interview. The weight of the evidence indicates that Ms. Markle did not purchase the Chinese food and, accordingly, had no receipt. The evidence provides additional indications of misconduct. The evidence indicates that Ms. Markle was fully aware of the employer's policy that she keep a receipt, if she had one, with her purchase. The evidence indicates that Ms. Markle was fully aware of the employer's prohibition against shopping on the clock, but engaged in the behavior nonetheless.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Markle was discharged for misconduct. Accordingly, Ms. Markle is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged for benefits paid to Ms. Markle.

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.

Because Ms. Markle received benefits for which she has been deemed ineligible, those benefits constitute an overpayment that Ms. Markle must repay to Iowa Workforce Development. Ms. Markle is overpaid \$1,092.00.

DECISION:

The Agency representative's November 6, 2007, reference 05, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until se has worked in and paid wages for insured work equal to ten times her weekly

benefit allowance, provided she meets all other eligibility requirements. The employer's account will not be charged. The claimant is overpaid \$1,092.00.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css