

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**LADDY J PECK**  
Claimant

**APPEAL NO. 12A-UI-08072-W**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**HY-VEE INC**  
Employer

**OC: 6/10/12**  
**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Claimant filed an appeal from a fact-finding decision dated July 2, 2012, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, an in-person hearing was scheduled for and held in Sioux City, Iowa on September 27, 2012. Claimant participated personally. Employer participated by Store Director, Jeff Bortell. Employer Exhibits A through F and Claimant Exhibits 1 through 3 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 began employment with Hy-Vee in August of 1980. At the time of separation, he was the wine and spirits manager. He was terminated on June 4, 2012 by employer for unauthorized removal of store property on May 29, 2012. On that date, claimant removed a case of an energy drink which was provided by a vendor at no cost. He did not attempt to conceal his removal of the beverage. He had an employee ring it up for the deposits and took it home for personal consumption.

**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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct.

This is a close, difficult case. The claimant was a long-term employee who gave many years of loyal service to Hy-Vee. He made a bad judgment call on May 29, 2012, by removing the case of energy drink from the store. The case of energy drink had clearly become Hy-Vee property, even though it was received at no cost. It was a significant error in judgment which at the time of hearing, claimant still refused to acknowledge.

The employer's policy did not specifically cover this particular type of transaction. Essentially, in his capacity as wine and spirits manager, claimant was given a free case of an energy drink that claimant had no intention of selling at Hy-Vee. This was clearly within the claimant's discretion as the manager of the wine and spirits section. The claimant testified he was already inundated with energy drinks and he had tried unsuccessfully to sell this drink previously. There was a good reason a vendor was giving the product away. The employer did have a code of ethics which specified to managers and employees how to treat conflicts of interest in general. While there is nothing in the exhibits presented by the employer which covers this specific scenario, the Code of Ethics did instruct employees to ask a supervisor for guidance in any unusual scenario. The claimant, however, did not seek such guidance and, in fact, steadfastly maintained that he did not make any type of error in judgment.

When the totality of the record is reviewed, however, the claimant's removal of the case of energy drink for his personal use was an isolated instance of poor judgment on an otherwise outstanding and long work record. In particular, the greater weight of evidence shows that the claimant possessed no intent to steal from his employer or harm it in any way. He simply made an isolated bad decision. Particular weight is given to the longevity of claimant's career, in addition to his credible testimony at hearing, exhibited through his demeanor. Consequently, the evidence fails to establish that claimant was discharged for an act of misconduct.

**DECISION:**

The fact-finding decision dated July 2, 2012, reference 01, is reversed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

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Joseph L. Walsh  
Administrative Law Judge

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Decision Dated and Mailed

jlw/css