

## FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Sandra Walter was employed by Hy-Vee as a full-time assistant manager on the overnight shift at Drug-Town from August 2, 2004 until August 14, 2005, when Manager Kyle Avis discharged her for theft of merchandise and lying during the investigation of the incident. Hy-Vee had purchased the Osco where Ms. Walter had worked for several years.

The incident that prompted the discharge took place during Ms. Walter's overnight shift on August 11-12. Ms. Walter took a bottle of Pepsi and a container of Pringles without paying for them. The theft came to the attention of Assistant Manager Kevin Rhode when he went to the front of the store to wait on customers. Mr. Rhode observed a one-liter bottle of Pepsi and the Pringles on the camera department counter. The items caught Mr. Rhode's attention because he had worked with Ms. Walter for several years and had never known her to purchase such a large soda. The Pepsi had a folded receipt under it that gave the appearance that the soda had been purchased. Mr. Rhode suspected that Ms. Walter may not have purchased the Pringles and waited to see whether she would purchase the item when she went on her lunch break. Later during the same shift, Mr. Rhode noted the Pringles had been partially consumed and the container was now on a shelf behind the camera department counter. Mr. Rhode looked at the receipt that was still under the Pepsi. The receipt was for a different sized Pepsi and did not reference the Pringles. Mr. Rhode made a photocopy of the receipt and returned it to its previous position.

On the morning of August 12, Mr. Rhode informed Manager Kyle Avis of the apparent theft. Mr. Avis indicated he would review store video surveillance and register transaction records before he would take the additional step of accusing Ms. Walter of theft. Later that day, Mr. Avis was leaving the store as Mr. Rhode arrived for his overnight shift. Mr. Avis instructed Mr. Rhode to observe whether Ms. Walter purchased the food items during her overnight shift. That evening, when only Ms. Walter, Mr. Rhode, and one other staff member remained in the store, Ms. Walter retrieved the chips from the shelf. Initially, Ms. Walter could not locate the chips and announced that no one should have thrown them away because she had purchased the chips on her lunch break the previous day. Mr. Rhode knew this was not true. Mr. Rhode reported the incident to Mr. Avis the morning of August 13.

At 7:30 a.m. on August 13, Mr. Avis summoned Ms. Walter to his office. Mr. Avis did not immediately accuse Ms. Walter of stealing the items. Instead, Mr. Avis advised Ms. Walter that the staff had been cleaning at the front of the store and had located some potato chips that did not have a receipt with them. Ms. Walter advised that the chips were hers and that she had purchased them the previous night before her break and that she no longer had the receipt. Mr. Avis then had Ms. Walter return to work, while he reviewed the video surveillance records and register transaction records. These records contradicted Ms. Walter's assertion.

Mr. Avis again summoned Ms. Walter to his office. Mr. Avis asked Ms. Walter what time she had purchased the chips. Ms. Walter then indicated that her daughter had bought the chips at Drug-Town early that day and even advised Mr. Avis of the method of payment. Mr. Avis reviewed the register transaction records with Ms. Walter and none of the recorded transactions supported Ms. Walter's assertion. Ms. Walter then asked if she could call her daughter. Mr. Avis was present for the call, but could only hear Ms. Walter's end of the conversation. Ms. Walter advised her daughter that Mr. Avis was accusing her of theft and asked her daughter whether she had the receipt for the chips she had bought. Ms. Walter then relayed to Mr. Avis that she had previously been mistaken about where her daughter had purchased the

chips. Ms. Walter further indicated that her daughter had actually purchased the chips from Wal-Mart. Mr. Avis asked when Ms. Walter's daughter had brought the chips to the store and Ms. Walter was unable to provide a time. Ms. Walter's daughter had not, in fact, been in the store during either of Ms. Walter's two most recent shifts. At this point in the conversation, Ms. Walter advised Mr. Avis that she was tired and wanted to go home. In approximately one hour, Ms. Walter called Mr. Avis to advise that she and her daughter had searched for the receipt for the chips, but could not locate it.

Ms. Walter called in sick for her next shift, but telephoned Mr. Avis the next morning. Ms. Walter wanted to know the status of her employment. Ms. Walter further advised Mr. Avis that if he was going to fire her, he should do it over the phone so she did not have to waste her time by coming to the store. Ms. Walter did come to the store, at which time Mr. Avis discharged her from the employment.

Ms. Walter established a claim for benefits that was effective August 14, 2005 and has received \$1,644.00 in benefits.

#### REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Walter was discharged for misconduct in connection with her employment. It does.

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).

Since the claimant was discharged, 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).

The weight of the evidence in the record establishes that Ms. Walter was indeed discharged for misconduct in connection with the employment. The evidence indicates that Ms. Walter did, in fact, commit simple misdemeanor theft of merchandise. Ms. Walter then aggravated the circumstances of the theft by repeatedly providing false information to her employer as the employer investigated the matter. As Ms. Walter was discharged for substantial misconduct in connection with the employment, she 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. Walter.

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.

Since Ms. Walter is disqualified for benefits, the benefits she has received constitute an overpayment she will have to repay.

#### DECISION:

The Agency representative's decision dated August 31, 2005, reference 01, is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she 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 shall not be charged for benefits paid to Ms. Walter. Ms. Walter is overpaid \$1,644.00.

jt/pjs