

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MATTHEW C WHIPPLE

Claimant

APPEAL NO. 09A-UI-17803-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC

Employer

OC: 11/01/09

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 November 23, 2009, reference 01, which held that no disqualification would be imposed regarding Matthew Whipple's separation from employment. After due notice was issued, a hearing was held by telephone on January 7, 2010. Mr. Whipple participated personally. The employer participated by Virginia Dietrich, Human Resources Manager; Jody Hitchcock, Delicatessen Manager; and Chris Desaulniers, Store Director. Exhibits One, Two, and Three were admitted on the employer's behalf. The employer was represented by Tim Speir of Unemployment Insurance Services.

ISSUE:

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

FINDINGS OF FACT:

Having heard the testimony and having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Whipple was employed by Hy-Vee, Inc. from February 18, 2005 until October 30, 2009. He was last employed full time as manager of the Italian food section, a position he assumed approximately one year before his separation. The employer has a policy, of which Mr. Whipple was aware, that prohibits consuming any store merchandise without first making payment for the item.

On October 30, 2009, Mr. Whipple took a plastic cup from his section and obtained a fountain drink. He consumed some of the pop on his way back to his work area but had not made payment. He obtained the pop at approximately 10:45 a.m. Virginia Dietrich was going through the departments to make sure policies were being followed and that everything was in order for an inspection. She noted that Mr. Whipple had pop in his area, which is a food code violation. She asked him who had rung the pop for him and he indicated Brian had. When she indicated she had asked Brian about the pop, Mr. Whipple indicated he would pay for it at that time. It

was approximately 11:10 a.m. when Ms. Dietrich approached him on the issue. He later paid the \$.74 for the pop at 11:32 a.m.

The employer has a zero-tolerance for theft and, as a result of his actions of October 30, Mr. Whipple was discharged the same day. He filed a claim for job insurance benefits effective November 1, 2009. He has received a total of \$2,560.00 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). Mr. Whipple was discharged for taking Hy-Vee, Inc. merchandise without first making payment. He does not dispute the fact that he had not paid for the pop when approached by Ms. Dietrich.

It was Mr. Whipple's contention that he told the cashier he would come back and pay for the pop. It was also his contention that he could not pay for the pop when he got it as he did not have his wallet with him because he was wearing a Halloween costume. However, he had 25 minutes between the time he took the pop and when he was approached by Ms. Dietrich but had made no attempt to pay for the pop during that interval. Whatever his reason for not paying for the pop, the fact remains that he took it and started to consume it without first making payment.

As a member of management, Mr. Whipple was expected to set the standards for others. His unauthorized removal of store property without first making payment had the potential of sending the wrong message to subordinates. Although the value of the pop was relatively small, the fact remains that it was the employer's property. The employer had the right to expect that all merchandise, regardless of value, would be paid for before consumption. The administrative law judge is not inclined to view Mr. Whipple's conduct as an oversight given his initial dishonesty with Ms. Dietrich. If he had simply forgotten to make the requirement payment, one would not have expected him to tell her that Brian rang up the purchase.

Given Mr. Whipple's status as a member of management, the administrative law judge concludes that his conduct constituted a substantial disregard of the standards the employer had the right to expect. As such, benefits are denied. Mr. Whipple has received benefits since filing his claim. Based on the decision herein, the benefits received now constitute an overpayment. As a general rule, an overpayment of job insurance benefits must be repaid. Iowa Code section 96.3(7). If the overpayment results from the reversal of an award of benefits based on an individual's separation from employment, it may be waived under certain circumstances. An overpayment will not be recovered from an individual if the employer did not participate in the fact-finding interview on which the award of benefits was based, provided there was no fraud or willful misrepresentation on the part of the individual. This matter shall be remanded to Claims to determine if benefits already received will have to be repaid.

DECISION:

The representative's decision dated November 23, 2009, reference 01, is hereby reversed. Mr. Whipple was discharged by Hy-Vee, Inc. for misconduct in connection with his employment. Benefits are denied until he has worked in and been paid wages for insured work equal to ten times his weekly job insurance benefit amount, provided he is otherwise eligible. This matter is remanded to Claims to determine the amount of any overpayment and whether Mr. Whipple will be required to repay benefits.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/pjs