

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARK A DEJONG

Claimant

APPEAL NO. 09A-UI-06849-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KRAFT FOODS GLOBAL INC

Employer

OC: 03/29/09

Claimant: Respondent (2R)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(2)b & c – Discharge/Gross Misconduct
Iowa Code § 96.3(7) - Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the April 24, 2009, reference 01, decision that allowed benefits. After due notice was issued, a telephone conference hearing was held on June 1, 2009. Claimant participated. Employer participated through Synda Amoral, investigator, and Jim Lessner, forensic computer specialist, and was represented by Bethany Holmes, director of human resources.

ISSUE:

The issue is whether claimant was discharged for reasons related to job misconduct or gross misconduct and if so, whether he was overpaid benefits as a result.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant most recently worked full-time as a Hy-Vee account retail operations manager and was separated on December 5, 2008. Tracy Bali, current customer business manager of the Fareway account since claimant was moved to the Hy-Vee account in June 2006 sent a letter to employer on June 20, 2008 reporting his suspicions that claimant had presented false Fareway invoices to Kraft for payment to third party vendor Weber Marketing for product promotions, demonstrations, and special events that were never held. Employer began an investigation shortly after June 20 and requested and began the process of reviewing internal data on that account from 2004 through 2006. Kraft contacted Fareway in October 2008 and asked it to cooperate by providing documentation and they did so in late October. Fareway reported they did not conduct the claimed demonstrations in the store and did not have the trade deals for which the invoices were created or paid to a third party vendor Weber Marketing. Employer compared the Kraft and Fareway documentation in November 2008 and conducted interviews on December 2, 3, and 4, 2008. Lessner took an image of claimant's computer when he was interviewed on December 4 but did not recover documents until after the separation. However, he did find three invoices and an e-mail request to pay the invoice on a subordinate's imaged computer before the separation and claimant admitted in the interview and at hearing to creating false customer (Fareway) invoices that

caused Kraft to payout at least \$272,173.00 to Weber Marketing. Some invoices were dated after checks were paid and claimant told employer he created those documents to get the Kraft checks. On at least one occasion he personally delivered to Fareway a Kraft check made payable to Fareway with a false Weber Marketing special event invoice and instructed Fareway to pay Weber for the marketing. Mark Weber told Amoral he took a 15 percent commission and wrote checks for the remaining funds to claimant who claimed to have used the money for customer golf trips, football games and other sporting events between February 2004 and August 2006. He did not provide Amoral with any receipts or evidence the trips and sporting events were held or attended even after multiple requests. Expenditures for such events are required to be authorized by company vice presidents and no such authorization was obtained. Amoral referred the investigation findings to management on December 5, 2008 and claimant was fired the same day. Employer has contacted the U.S. Attorney's office.

The claimant has received unemployment benefits since filing a claim with an effective date of March 29, 2009.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related gross misconduct.

Iowa Code § 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.

Iowa Code § 96.5-2-b 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:

b. If gross misconduct is established, the department shall cancel the individual's wage credits earned, prior to the date of discharge, from all employers.

Iowa Code § 96.5-2-b-c 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:

b. Provided further, If gross misconduct is established, the department shall cancel the individual's wage credits earned, prior to the date of discharge, from all employers.

c. Gross misconduct is deemed to have occurred after a claimant loses employment as a result of an act constituting an indictable offense in connection with the claimant's employment, provided the claimant is duly convicted thereof or has signed a statement admitting the commission of such an act. Determinations regarding a benefit claim may be redetermined within five years from the effective date of the claim. Any benefits paid to a claimant prior to a determination that the claimant has lost employment as a result of such act shall not be considered to have been accepted by the claimant in good faith.

An indictable offense is a crime prosecuted by indictment or information. In Iowa, indictable offenses include serious misdemeanors, aggravated misdemeanors, and felonies, all of which are punishable by a fine of more than \$500 and more than 30 days in jail. <http://www.judicial.state.ia.us/wfdata/frame2240-1450/#>

Iowa Code § 714.2 provides:

1. The theft of property exceeding ten thousand dollars in value, or the theft of property from the person of another, or from a building which has been destroyed or left unoccupied because of physical disaster, riot, bombing, or the proximity of battle, or the theft of property which has been removed from a building because of a physical disaster, riot, bombing, or the proximity of battle, is theft in the first degree. Theft in the first degree is a class "C" felony.

2. The theft of property exceeding one thousand dollars but not exceeding ten thousand dollars in value or theft of a motor vehicle as defined in chapter 321 not exceeding ten thousand dollars in value, is theft in the second degree. Theft in the second degree is a class "D" felony. However, for purposes of this subsection, "*motor vehicle*" does not include a motorized bicycle as defined in section 321.1, subsection 40, paragraph "b".

3. The theft of property exceeding five hundred dollars but not exceeding one thousand dollars in value, or the theft of any property not exceeding five hundred dollars in value by one who has before been twice convicted of theft, is theft in the third degree. Theft in the third degree is an aggravated misdemeanor.

4. The theft of property exceeding one hundred dollars in value but not exceeding five hundred dollars in value is theft in the fourth degree. Theft in the fourth degree is a serious misdemeanor.

5. The theft of property not exceeding one hundred dollars in value is theft in the fifth degree. Theft in the fifth degree is a simple misdemeanor.

Claimant's admission under oath to creation of false documents in order to obtain funds from Kraft, funneled through Fareway and Weber Marketing when no goods or services were provided for such funds, no authorization for customer sporting event outings was granted, and no such outings occurred, is evidence of gross misconduct. Benefits are denied and wage credits shall be deleted from all employers prior to the date of discharge on December 5, 2008.

The administrative law judge further concludes claimant has been overpaid benefits.

Iowa Code § 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

Because claimant's separation was disqualifying, benefits were paid to which claimant was not entitled. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment may not be recovered when it is based on a reversal on appeal of an initial determination to award

benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. If so, the employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code § 96.3(7). In this case, the claimant has received benefits but was not eligible for those benefits. The matter of whether the overpayment should be recovered under Iowa Code § 96.3(7)b is remanded to the Agency.

DECISION:

The April 24, 2009 reference 01, decision is reversed. The claimant was discharged from employment due to job-related gross misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible, and wage credits shall be deleted from all employers prior to the date of discharge on December 5, 2008.

REMAND:

The matter of whether the overpayment should be recovered under Iowa Code § 96.3(7)b is remanded to the Agency.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/pjs