

**IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI**

**Appeal Number: 04A-UI-01418-ET
OC 01-04-04 R 02
Claimant: Appellant (1)**

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

**ALVA MILLARD
710 W ADAMS
JEFFERSON IA 50129**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

**FAREWAY STORES INC
2300 E 8TH
BOONE IA 50036**

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

**DOROTHY DAKIN
ATTORNEY AT LAW
712 ARDEN ST
BOONE IA 50036**

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the February 2, 2004, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on March 2, 2004. The claimant participated in the hearing with Attorney Dorothy Dakin. Mike Mazour, Director of Human Resources, and Wes Bass, Assistant Warehouse Manager, participated in the hearing on behalf of the employer.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time warehouseman for Fareway Stores from April 10, 1990 to January 7, 2004. On January 7, 2004, two warehouse employees notified Wes Bass, Assistant

Warehouse Manager, that the claimant had opened a return carton of cigarettes and taken two packs. Mr. Bass went to the warehouse, met with John Wheeler, Warehouse Manager, and then talked to the witnesses that reported the situation. He found the carton of cigarettes and noted it had been opened and two packs were missing. Mr. Bass met with the claimant and asked if he took the cigarettes. The claimant denied doing so. Mike Mazour, Director of Human Resources, also went to the warehouse and asked the claimant if he took the cigarettes. The claimant again denied it. The witnesses had told the employer that the claimant went to his van after taking the cigarettes and Mr. Mazour asked the claimant for permission to search his vehicle. After the claimant consented to the search, the parties went to his van and found the two packs of cigarettes on the driver's seat. The claimant admitted that he took the cigarettes and the employer terminated his employment for theft of company property. The claimant testified he did not admit taking the cigarettes when first asked about it by the employer because he thought he was being "set-up" and that other employees stole from the employer without being discharged but he did not report any theft by other employees to the employer. The employer notified the police and the claimant received a deferred prosecution for a charge of fifth-degree theft.

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 misconduct.

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).

The employer has the burden of proving disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant admitted that he opened a carton of returned cigarettes in the warehouse and took two packs. He testified he thought he was being "set-up" but did not provide any evidence to explain how his taking the cigarettes was the result of being set up by co-workers or the employer. While the claimant may have thought the cigarettes had no value to the employer, that was not his determination to make. The employer does ship returned cigarettes back to the vendor for credit. The employer did not give the claimant or other employees permission to take any product from the warehouse. Although the claimant argues that other employees took things from the warehouse and were not disciplined for their actions, that argument is not persuasive because the claimant admits he did not tell the employer about the employee thefts and, consequently, he cannot reasonably complain the employer failed to respond. While this may have been an isolated incident on the part of the claimant, it was a criminal act, even if a simple misdemeanor, and it is not unreasonable for an employer to terminate the employment of an individual that steals from it. The administrative law judge concludes the claimant's actions January 7, 2004, demonstrate a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. Consequently, the employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Benefits are denied.

Both parties mentioned gross misconduct in arguing their position. Under Iowa unemployment insurance law, gross misconduct is used to cancel all previous wage credits earned from any employer prior to the discharge when a claimant is discharged for committing an indictable offense in connection with the employment and is convicted of the offense or has signed a statement admitting his guilt. Iowa Code Section 96.5-2-c. An employee may be disqualified from receiving benefits for misconduct that is not an indictable offense. Gross misconduct is not applicable to this case.

DECISION:

The February 2, 2004, reference 01, decision is affirmed. The claimant was discharged from employment due to job-related 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.

je/b