

**IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU**

DANIEL R KALER
Claimant

HY-VEE INC
Employer

APPEAL 23A-UI-03741-DZ-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 03/19/23
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

Hy-Vee Inc, the employer/appellant,¹ filed an appeal from the Iowa Workforce Development (IWD) April 5, 2023 (reference 01) unemployment insurance (UI) decision. The decision allowed Mr. Kaler REGULAR (state) UI benefits because IWD concluded the employer dismissed him from work on March 21, 2023 for a reason that did not disqualify him from receiving UI benefits. The Iowa Department of Inspections and Appeals UI Appeals Bureau mailed notices of hearing to the employer and Mr. Kaler. The undersigned administrative law judge held a telephone hearing on April 25, 2023. The employer participated through Dale Mitchell, district director, Brittany Adams, human resources manager and Kelly Ray, Experian/Corporate Cost Control hearing representative. Mr. Kaler participated personally. The undersigned took official notice of the administrative record and admitted Employer's Exhibit 1 as evidence in the case.

ISSUES:

Did the employer discharge Mr. Kaler from employment for disqualifying job-related misconduct?

Did IWD overpay Mr. Kaler UI benefits?

If so, should he repay the benefits?

FINDINGS OF FACT:

Having reviewed the evidence in the record, the administrative law judge finds: Mr. Kaler began working for the employer on November 30, 2009. He worked as a part-time meat clerk. His employment ended on March 21, 2023.

On March 14, 2023, Mr. Kaler worked a usual shift. During his shift, Mr. Kaler brought a beverage and two packages of jerky to the employer's cashier-less register. Mr. Kaler scanned and paid for the beverage. He did not scan or pay for either package of jerky. Mr. Kaler returned to his work area, finished his shift, and clocked out. At some point, the employee the employer had assigned to monitor the cashier-less registers (Employee A) reported to Ms. Adams that Mr. Kaler had not paid for all the items he brought to the register. Employee A gave

¹ Appellant is the person or employer who filed the appeal.

Ms. Adams a duplicate receipt from Mr. Kaler's transaction and asked Ms. Adams to review the employer's video footage.

Ms. Adams reviewed the employer's video footage and saw Mr. Kaler pay for the beverage but not pay for the jerky and take the beverage and jerky to his work area. Ms. Adams reported the incident to Mr. Mitchell and showed him the duplicate receipt. On March 15, Mr. Mitchell the employer's video footage and saw the same things Ms. Adams saw. Mr. Kaler worked on March 15. The employer did not discuss the matter with Mr. Kaler that day.

Mr. Kaler returned to work on March 21. Toward the end of his shift, the employer called Mr. Kaler into the office. Mr. Mitchell and Ms. Adams met with Mr. Kaler. They told Mr. Kaler what they had learned about his March 14 transaction. They told Mr. Kaler that they reviewed the video, but they did not show Mr. Kaler the video. Mr. Kaler did not ask to see the video. They asked Mr. Kaler if he had a receipt for the transaction. Mr. Kaler stated that he did not. Mr. Kaler stated that he remembered buying a beverage that day, but he didn't remember getting jerky that day. Mr. Mitchell and Ms. Adams showed Mr. Kaler the duplicate receipt. Mr. Kaler again stated that he did not remember getting jerky that day. Mr. Kaler stated that he had been in a slump because he had lost a family law case a few days earlier. He stated that he must have tried to scan the jerky to pay for it, but the scan did not work. He also repeated several times that he did not know why he would not have scanned the jerky and that he is not a thief. Mr. Kaler also offered to pay for the jerky.

The employer's policy prohibits theft, and consumption or use of the employer's products without a paid receipt. The policy further provides that employees who violate the policy are subject to discipline up to, and including, termination of employment. Mr. Kaler acknowledged receiving a copy of the policy on March 5, 2021. Mr. Mitchell and Ms. Adams terminated Mr. Kaler's employment for violating the employer's policy. Mr. Kaler had no prior discipline record during his over twelve years of employment with this employer.

In the appeal hearing, Mr. Kaler testified that he did not remember getting jerky that day and he did not acknowledge that he had jerky or took jerky without paying for it that day. Ms. Adams testified that the employer is a family, and the employer would have fronted Mr. Kaler money on his paycheck and/or employees would have let Mr. Kaler borrow or maybe even given Mr. Kaler money if he did not have money that day. This is not a policy of the employer.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the undersigned concludes the employer discharged Mr. Kaler from employment for a reason that does not disqualify him from receiving UI benefits.

Iowa Code section 96.5(2)(a) and (d) provide:

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.

d. For the purposes of this subsection, "misconduct" means a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of such the employee's contract of employment. Misconduct is 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. Misconduct by an individual includes but is not limited to all of the following:

...

(13) Theft of an employer or coworker's funds or property.

Iowa Code section 714.1 provides, in relevant part:

Theft defined.

A person commits theft when the person does any of the following:

1. Takes possession or control of the property of another, or property in the possession of another, with the intent to deprive the other thereof.

The employer has the burden of proof in establishing disqualifying job misconduct.² The issue is not whether the employer made a correct decision in separating the claimant from employment, but whether the claimant is entitled to unemployment insurance benefits.³ Misconduct must be "substantial" to warrant a denial of job insurance benefits.⁴

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation of the employer's policy or rule is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

In this case, the conduct for which the employer terminated Mr. Kaler's employment was an isolated incident of negligence. "[M]ere negligence is not enough to constitute misconduct."⁵ A claimant will not be disqualified if the employer shows only "inadvertencies or ordinary negligence in isolated instances."⁶ Even though Mr. Kaler does not remember having the jerky, the evidence establishes he did. But the employer has not established that Mr. Kaler intended to deprive it of the two packages of jerky. He simply forgot to pay for the jerky.

² *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

³ *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984).

⁴ *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

⁵ *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 666 (Iowa 2000).

⁶ 871 IAC 24.32(1)(a).

Mr. Kaler was careless, but his carelessness does not indicate “such degree of recurrence as to manifest equal culpability, wrongful intent or evil design” such that it could accurately be called misconduct.⁷ The employer has failed to establish that Mr. Kaler committed theft when he forgot to pay for the jerky on March 14. Since the employer has not established disqualifying, job-related misconduct, benefits are allowed, as long as no other decision denies Mr. Kaler UI benefits.

Since Mr. Kaler is eligible for REGULAR (state) UI benefits per this decision, the issues of overpayment and repayment are moot. An issue being moot means there is nothing left to decide.⁸

DECISION:

The April 5, 2023, (reference 01) UI decision is AFFIRMED. The employer discharged Mr. Kaler from employment for a reason that does not disqualify him from receiving UI benefits. Benefits are allowed, as long as no other decision denies him UI benefits. Any benefits claimed and withheld on this basis must be paid.



Daniel Zeno
Administrative Law Judge

April 28, 2023
Decision Dated and Mailed

scn

⁷ Iowa Admin. Code r. 871-24.32(1)(a); *Greenwell v. Emp't Appeal Bd.*, No. 15-0154 (Iowa Ct. App. Mar. 23, 2016).

⁸ *Iowa Bankers Ass'n v. Iowa Credit Union Dep't*, 335 N.W.2d 439, 442 (Iowa 1983).

APPEAL RIGHTS. If you disagree with this decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
Online: eab.iowa.gov**

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.

AN APPEAL TO THE BOARD SHALL 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.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to **file a petition for judicial review in District Court** within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf> or by contacting the District Court Clerk of Court <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or 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.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
En línea: eab.iowa.gov**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de **presentar una petición de revisión judicial en el Tribunal de Distrito** dentro de los treinta (30) días después de que la decisión adquiriera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que se encuentra en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf> o comunicándose con el Tribunal de Distrito Secretario del tribunal <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.