

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BLAINE P MCCOY
Claimant

APPEAL NO. 10A-UI-14989-VS

**ADMINISTRATIVE LAW JUDGE
DECISION**

FAREWAY STORES INC
Employer

OC: 08/29/10
Claimant: Appellant (2)

Section 96.5-2-A – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated October 20, 2010, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on December 13, 2010, in Davenport, Iowa. Claimant participated. The claimant was represented by Andre Harrison. Employer participated by Darren Lastine, Meat Manager Bettendorf store. The employer was represented by Garrett Piklapp, Attorney at Law. The record consists of the testimony of Darren Lastine; the testimony of Blaine McCoy; and Employer's Exhibit 1.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer owns and operates retail grocery stores. The claimant worked as a meat cutter at the employer's store in Bettendorf, Iowa. The claimant was hired on June 7, 2004. The claimant's last day of work was August 28, 2010. The claimant was terminated on August 31, 2010.

The incident that led to the claimant's termination occurred on August 28, 2010, at approximately 8:30 p.m. The store closes at 9:00 p.m. The claimant was supervising a relatively inexperienced crew as well as doing his own work. The claimant took a Lunchable worth \$1.89 from the self serve counter. He intended to eat that product on his break. As he was about to go back to the break room a customer needed assistance. The claimant put the Lunchable down and helped the customer. After he was finished he took the product back to the break room and ate it. He did not pay for the product. His reason for not paying was that he forgot when he was interrupted by the customer.

The employer has a policy that prohibits employee theft. Theft of company property leads to termination. The claimant had just been given a written reprimand and was to serve a three-day

suspension for selling 20 pounds of ground beef at a reduced price. He received a warning in 2009 for selling bacon at a lower price.

REASONING AND CONCLUSIONS OF LAW:

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.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. The legal definition of misconduct excludes negligence in isolated situations. In order to justify disqualification, the evidence must establish that the final incident leading to the decision to discharge was a current act of misconduct. See 871 IAC 24.32(8). See also Green v. EAB, 426 N.W.2d 659 (Iowa App. 1988). The employer has the burden of proof to establish misconduct.

One of the most fundamental duties owed by an employee to an employer is honesty. An employer can reasonably expect that an employee will not misappropriate its property. The claimant was discharged because he failed to pay for a product that he consumed. The claimant admitted that he ate the Lunchable without paying for it. The claimant credibly testified that he was busy and forgot to pay for the item after being interrupted by a customer.

The administrative law judge understands that theft of company property is an offense that leads to termination and the employer could reasonably expect that the claimant would pay for food he ate at work. In this case, however, the claimant's failure to pay for the item was due to forgetfulness as opposed to an intentional act on his part. Although the claimant did have two other warnings that arguably involved dishonesty, those two offenses were for selling a product

at an unapproved price as opposed to the claimant taking property for himself. The administrative law judge concludes that the incident that actually led to the claimant's termination is not misconduct as it was not due to deliberate action on the part of the claimant. Since there is no current act of misconduct, benefits are allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated October 20, 2010, reference 01, is reversed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css