

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DOUG C MOTT
Claimant

APPEAL NO. 10A-UI-04213-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

**OC: 02/14/10
Claimant: Appellant (1)**

Section 96.5-2-a - Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated March 11, 2010, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on May 4, 2010. Claimant participated. The claimant was represented by Emilie J. Roth Richardson, attorney at law. Employer participated by Adam Gillies, manager perishables; Jeff Buxton, kitchen manager; and Lisa Hoppman, store director. The employer was represented by Tim Spier. The record consists of the testimony of Adam Gillies; the testimony of Jeff Buxton; the testimony of Lisa Hoppman; the testimony of Doug Mott; and Employer's Exhibits 1-3.

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 is a retail grocery store located in Dubuque, Iowa. The claimant was hired on August 27, 2003, as a part-time produce clerk. He was terminated on February 16, 2010, for failing to pay for a cup of coffee in violation of employer policies on taking store merchandise without paying for that merchandise.

The incident in question took place on February 16, 2010. The claimant was going on break and had a strawberry shortcake that he was planning to eat. He went to the kitchen area and took a coffee cup and went into the dining area. He filled the coffee cup with coffee and sat down to drink the coffee. He did not pay for the coffee. Jeff Buxton, the kitchen manager, saw the claimant take the coffee cup. He went by the claimant's table and saw that there was coffee in the cup. He informed his supervisor, Adam Gillies. A check was made with all store personnel to see if the claimant had paid for the cup of coffee. No one reported that the claimant had purchased the coffee.

The claimant was then asked to come to the office. Lisa Hoppman, the store director, and Adam Gillies were present. The claimant admitted that he had not paid for the coffee. He also said that he had been given the strawberry shortcake by another employee as it was outdated merchandise.

The employer has zero tolerance for employee theft. The claimant had been previously warned on two occasions against consuming food he found on the store premises. He had picked up peanuts from the produce floor and eaten them. He had also been warned by Ms. Hoppman when she saw him eating chips from a bag in a discard bin.

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 disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. One of the most fundamental duties owed by an employee to his or her employer is honesty. An employer can reasonably expect that an employee will not take the employer's property without paying for it. The employer in this case had a clear policy against taking its property and a zero tolerance for violating that policy.

The greater weight of the credible evidence in this case is that the claimant took a cup of coffee without paying for it. The claimant's testimony that he had paid for the coffee earlier in the day

is not credible. The employee who supposedly rang up the transaction was not even at work at 8:40 a.m. when the claimant supposedly paid for the coffee. He did not have a receipt. When he met with Mr. Gillies and Ms. Hoppman at the time of his termination, he said nothing about having paid for the coffee earlier. He later tried to say that it was "re-fill", but the alleged re-fill took place at 2:00 in the afternoon. In addition, if it was a re-fill, the claimant would have had an old cup. He took a new cup from the kitchen at 2:00 in the afternoon.

The claimant knew that he was not supposed to consume food, even discarded food, if it was not paid for prior to eating the food. He had been warned on two occasions about this. The greater weight of the evidence is that the claimant made a deliberate choice to take a cup of coffee without paying for it. Misconduct has been established. Benefits are denied.

DECISION:

The decision of the representative dated March 11, 2010, reference 01, is affirmed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs