

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JUSTIN WICKETT

Claimant

APPEAL NO: 12A-UI-02090-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING COMPANY

Employer

OC: 01-08-12

Claimant: Respondent (2R)

Section 96.5-2-a – Discharge/Misconduct

Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the February 17, 2012, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on March 19, 2012. The claimant did not respond to the hearing notice and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. Kathy Brown, Manager and Amy Cannon-Rupp, Cook, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a part-time cook/submarine sandwich maker for Casey's Marketing Company from July 23, 2011 to January 13, 2012. On January 8, 2012, the claimant was scheduled to work 9:00 a.m. to 7:00 p.m. He texted manager Kathy Brown, which was a violation of the employer's work rules, to state he wanted more hours at 4:07 p.m. and then texted her again stating he wanted to leave early at 4:12 p.m. Ms. Brown did not respond to his text messages because employees are supposed to use the store phone to contact her if necessary. Around 5:30 p.m. two customers came in to order submarine sandwiches and the claimant told them they needed to wait a minute and started doing dishes rather than waiting on the customers and making their sandwiches. Pizza Cook Amy Cannon-Rupp was making pizzas but noticed the claimant was not waiting on the customers so after a minute or two she took their orders and started making their sandwiches while still trying to attend to her pizzas. When one of Ms. Cannon-Rupp's pizzas was ready she asked the claimant to finish making the customers' subs and he said, "Just a minute," so she checked her pizzas and went back to finish making the sandwiches. The customers asked Ms. Cannon-Rupp why the claimant would not help them. According to the employer's surveillance tapes, which confirmed the above statements, the claimant put his coat on and went outside at 5:50 p.m., returned at 6:00 p.m. and clocked out without permission. The claimant had been verbally warned repeatedly about

his failure to wait on customers, which is the most important aspect of the employer's business, but the claimant failed to improve his customer service or attitude. He had been told that if his customer service skills and attitude did not improve he would lose his job but his behavior continued. Ms. Brown attempted to call him approximately three times after he walked off the job and he eventually called her back and said, "What's up? Do I still have a job?" Ms. Brown asked him to come in January 13, 2012, at which time she showed him the video, talked about how important customer service was and gave him the termination paperwork.

The claimant has claimed and received unemployment insurance benefits since his separation from this employer.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job 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.

The employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant texted Ms. Brown twice January 8, 2012, once to say he wanted more hours and four minutes later to say he wanted to leave early. He knew or should have known texting Ms. Brown was not an acceptable way to communicate with her but that he was to use the store phone. The claimant then blatantly failed to wait on

customers who came in to purchase sub sandwiches and started doing dishes instead of providing the expected customer service. Ms. Cannon-Rupp tried to do both her job, as well as the claimant's, and when she needed help he told her to wait and continued doing dishes instead of stopping to help the customers. The claimant's repeated failure to provide the expected and required customer service throughout his employment and his decision to walk off the job January 8, 2012, demonstrated 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. The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits are denied.

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 will 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. 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 determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code § 96.3-7-b is remanded to the Agency.

DECISION:

The February 17, 2012, reference 01, decision is reversed. 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. The claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code § 96.3-7-b is remanded to the Agency.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs