

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

NICHOLAS LONG
Claimant

APPEAL NO. 14A-UI-08661-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**CASEY'S MARKETING COMPANY
CASEY'S GENERAL STORES**
Employer

**OC: 07/20/14
Claimant: Respondent (2)**

Iowa Code § 96.5(2)(a) – Discharge for Misconduct
Iowa Code § 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Casey's General Stores (employer) appealed an unemployment insurance decision dated August 12, 2014 (reference 01) which held that Nicholas Long (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 9, 2014. The claimant participated in the hearing. The employer participated through Manager Troy Swisher and Employer Representative Alisha Weber. Employer's Exhibits One through Three was admitted into evidence.

ISSUES:

The issues are whether the claimant is disqualified for benefits, whether he was overpaid unemployment insurance benefits, whether he is responsible for repaying the overpayment, and whether the employer's account is subject to charge.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant worked as a part-time employee from March 5, 2013 through June 24, 2014 when he was discharged for violation of repeated company policy. The employer's handbook provides rule 34.555 which prohibits cell phone usage in the store while on duty. This includes talking, texting, video or audio recording, and picture taking. The claimant signed an acknowledgement of receipt of the employer's handbook on the date of hire. He testified that he had received a verbal warning for violation of this policy and the manager testified that the issue was addressed in a group meeting. The claimant received a written warning on May 19, 2014 for again violating this policy. Although the warning indicates it is a verbal warning, the manager testified it was a written warning. The claimant signed the warning and his comments were that he was taking a picture of a note for a time request to make sure it was not thrown away.

The claimant was using his cell phone on June 15, 2014 instead of helping a customer who was waiting at the counter. The customer complained and the claimant was subsequently discharged a week later.

The claimant filed a claim for unemployment insurance benefits effective July 20, 2014 and has received benefits after the separation from employment in the amount of \$1,239.00. Employer Representative Alisha Weber participated in the fact-finding interview on behalf of the employer. She received the phone call at 1:17 p.m. on August 6, 2014 and also submitted written documentation.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-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. 871 IAC 24.32(1).

The employer has the burden to prove the discharged employee is disqualified for benefits for misconduct. *Sallis v. Employment Appeal Bd.*, 437 N.W.2d 895, 896 (Iowa 1989). The claimant was discharged on June 24, 2014 for repeated violation of company policy by using his cell phone in the store while working. He had been repeatedly warned about it and in addition to the policy violation in the last incident, he was using his cell phone while making a customer stand and wait at the counter. The claimant's conduct was a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee. His separation is disqualifying and benefits are denied.

Because the claimant has been deemed ineligible for benefits, any benefits he has received could constitute an overpayment. The unemployment insurance law requires benefits be recovered from a claimant who receives benefits from an initial decision and is later denied benefits from an appeal decision, even though the claimant acted in good faith and was not otherwise at fault. In some cases, the claimant might not have to repay the overpayment if both of the following conditions are met: 1) there was no fraud or willful misrepresentation by the claimant; and 2) the employer failed to participate in the fact-finding interview. If the overpayment is waived due to the employer's failure to participate, that employer's account continues to be subject to charge for the overpaid amount. See Iowa Code § 96.3-7.

The claimant received benefits in the amount of \$1,239.00 as a result of this claim. A waiver cannot be considered because the employer participated in the fact-finding interview. See 871 IAC 24.10. Its account is not subject to charge and the claimant is responsible for repaying the overpayment amount.

DECISION:

The unemployment insurance decision dated August 12, 2014 (reference 01) is reversed. The claimant is not eligible to receive unemployment insurance benefits because he was discharged from work for misconduct. Benefits are withheld until 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 was overpaid \$1,239.00 and he must repay those benefits.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

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