

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KENT J POWELL

Claimant

APPEAL NO. 09A-UI-15923-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING COMPANY

Employer

OC: 08/30/09

Claimant: Respondent (2-R)

Section 96.5-2-a – Discharge

Section 96.3-7 – Benefit Overpayment

STATEMENT OF THE CASE:

Casey's Marketing Company filed a timely appeal from a representative's decision dated October 14, 2009, reference 04, which held claimant eligible to receive unemployment insurance benefits. After due notice a telephone hearing was conducted on November 24, 2009. The claimant participated personally. The employer participated by Doreen Feick, Area Supervisor.

ISSUE:

The issue is whether the claimant was discharged for misconduct in connection with his work and whether the claimant has been overpaid job insurance benefits.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds Kent Powell was employed by Casey's Marketing Company from April 15, 2009 until September 2, 2009 when he was discharged for violation of company policy. Mr. Powell was employed on a full-time basis and worked as a cashier and kitchen worker. His immediate supervisor was the manager of the store where he was assigned.

In response to a complaint from a company customer that Mr. Powell was providing merchandise without charge, the employer reviewed security tapes at the facility where Mr. Powell was most recently assigned to work. The tapes showed the claimant providing a substantial number of doughnuts outside the facility to another individual without charge.

The employer reviewed the security tape with Mr. Powell and the claimant provided conflicting information with respect to whether payment had been made for the doughnuts. Based upon the employer's policy that prohibited using, consuming or providing company products without charge a decision was made to terminate Mr. Powell from employment. At the time of discharge Mr. Powell did not indicate that he had been instructed to provide the merchandise to others without charge.

It is the claimant's position that stale doughnuts were routinely given away at the Winterset facility where he was most recently assigned to work and that he had engaged in the practice because he had seen other workers do it and that the manager at the Winterset store had confirmed to Mr. Powell that the practice was acceptable.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record is sufficient to warrant the denial of unemployment insurance benefits. It is.

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.

In this matter the evidence establishes that a security video tape clearly showed Mr. Powell providing a substantial amount of company products to an individual outside of the store without receiving payment for the product. Company policy clearly prohibits employees from providing merchandise to individuals without payment and the claimant was aware of the company policy that also required employees to pay for all items that they themselves used, removed or consumed. When initially confronted with the security tapes Mr. Powell disputed whether payment had been made for the items in a meeting with the company's area supervisor. The claimant, however, did not indicate that he had been authorized to provide the merchandise without charge or that it was a common practice at the Winterset facility. Based upon the clear evidence that the claimant was providing company merchandise without charge to another

individual outside the store facility and the failure of the claimant to provide a reasonable explanation, the employer made a decision to terminate Mr. Powell from his employment. Misappropriation or providing of company merchandise to other individuals without charge shows a willful disregard for the employer's interests and standards of behavior that the employer has a right to expect.

Although the administrative law judge is cognizant that Mr. Powell maintains that it was a common practice to give away merchandise and that the practice was authorized by management, the administrative law judge finds the claimant's testimony to strain credibility. Although the claimant was given an opportunity to explain his conduct while viewing the security tape and at the time of discharge, he did not provide this explanation to his employer. The administrative law judge finds the evidence in support of the employer. Benefits are withheld.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

DECISION:

The representative's decision dated October 14, 2009, reference 04, is reversed. Kent Powell is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided that he is otherwise eligible. The issue of whether the claimant must repay the unemployment insurance benefits is remanded to the UIS Division for determination.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs