**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS**

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

**MELISSA N ORSINI**
Claimant

**CASEY'S MARKETING COMPANY**
Employer

**APPEAL NO. 15A-UI-12492-S1-T**

**ADMINISTRATIVE LAW JUDGE DECISION**

**OC: 10/04/15**
**Claimant: Respondent (1)**

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

**STATEMENT OF THE CASE:**

Casey's Marketing Company (employer) appealed a representative's November 3, 2015, decision (reference 01) that concluded Melissa Orsini (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for December 2, 2015. The claimant participated personally. The employer participated by Jolinda Wilson, Area Supervisor, and Alisha Weber, Unemployment Insurance Consultant. The employer offered and Exhibit One was received into evidence.

**ISSUE:**

The issue is whether the claimant was separated from employment for any disqualifying reason.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on August 14, 2012, as a full-time kitchen manager. The claimant signed for receipt of the employer's handbook on August 13, 2012. On December 29, 2014, the employer issued the claimant a written warning for making a male cardboard snowman with other employees. On March 30, 2015, the employer issued the claimant a written warning for taking an unauthorized break to go see a house fire. On June 11, 2015, the employer issued the claimant a written warning for making a paperclip chain when she was not assigned any other duties. The employer notified the claimant that further infractions could result in termination from employment.

On October 1, 2015, the claimant asked the store manager if she could leave at 4:00 p.m. The store manager told her she could. At 4:30 p.m. she told the assistant manager she was leaving. He asked her if she was going to cut some veggies. She said she was not going to cut anymore because the kitchen did not need any. The assistant manager responded, "Well you're good at one thing, being a fucking bitch." Perhaps due to the verbal exchange, the claimant forgot to take the garbage she left outside the door to the gated garbage bin. On October 2, 2015, the

employer terminated the claimant for not properly disposing of garbage, not cutting vegetables, and leaving early. The assistant manager continues to work for the employer.

The claimant filed for unemployment insurance benefits with an effective date of October 4, 2015. The employer participated personally at the fact-finding interview on November 2, 2015, by Kelly Rohrbouck.

**REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682 (Iowa 1976). The employer had the power to present testimony but chose to not to provide any eye witnesses or written statements. The employer did not

provide first-hand testimony at the hearing and, therefore, did not provide sufficient eye witness evidence of job-related misconduct to rebut the claimant's denial of said conduct. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

**DECISION:**

The representative's November 3, 2015, decision (reference 01) is affirmed. The employer has not met its burden of proof to establish job-related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/css