

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

CHRISTINE L THURMAN
Claimant

APPEAL NO. 18A-UI-09510-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING COMPANY
Employer

OC: 08/19/18
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 September 5, 2018, decision (reference 01) that concluded Christine Thurman (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 October 2, 2018. The claimant participated personally. The employer participated by Connie Sublette, Area Supervisor, and Zontel McCann, Lead Unemployment Insurance Consultant. Exhibit D-1 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 July 9, 2016, as a full-time sales clerk. She signed for receipt of the employer's handbook on July 18, 2016. In July 2017, the claimant became a delivery driver for the employer. In July 2018, the claimant continued her work as a delivery driver two days per week and started working as a cashier two days per week.

On April 13, 2017, the employer issued the claimant a written warning for failure to request identification before selling a customer a tobacco product. The customer frequented the store and purchased alcohol from the claimant after the claimant examined her identification previously. The claimant knew she was of legal drinking age and, therefore, was old enough to purchase tobacco products. On December 12, 2017, the employer issued the claimant a verbal warning for properly reporting her absence due to illness on December 10, 2017. The claimant told the employer she was in the hospital with pneumonia and provided the employer with a doctor's excuse. On April 30, 2018, the employer issued the claimant a verbal warning for properly reporting her absence due to transportation issues on April 29, 2018. The employer notified the claimant each time that further infractions could result in termination from employment.

On August 15, 2018, the claimant worked the register by herself while the other four employees unloaded a truck. There was a long line of customers at the register. The claimant accidentally rang up one customer as a cash sale when the customer wanted to use his debit card. Later, the claimant properly followed the instructions to post void the sale. At that point she realized she may have voided the wrong ticket. She told her manager and the manager said he would look for the ticket for the \$13.00 or \$14.00 sale. The employer did not lose any money because the claimant voided the sale in the register.

On August 16, 2018, the employer told the manager to terminate the claimant and he did so. The manager told the claimant he would not have terminated her. He saw no indication of theft.

The claimant filed for unemployment insurance benefits with an effective date of August 19, 2018. The employer participated personally at the fact finding interview on September 4, 2018, by Zontel McCann.

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, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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). Misconduct connotes volition. A failure in job performance which results from inability or incapacity is not volitional and therefore not misconduct. *Huntoon v. Iowa Department of Job Services*, 275 N.W.2d 445 (Iowa 1979). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988). The employer discharged the claimant for poor work performance and has the burden of proof to show evidence of intent. The employer did not provide any evidence of intent at the hearing. The claimant's poor work performance on August 15, 2018, was a result of a mistake. Consequently the employer did not meet its burden of proof to show misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's September 5, 2018, 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.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/rvs