

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NATHAN A OSTLUND
Claimant

APPEAL NO. 08A-UI-06897-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEYS MARKETING COMPANY
Employer

OC: 06/22/08 R: 03
Claimant: Appellant (1)

Iowa Code section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Nathan Ostlund filed a timely appeal from the July 21, 2008, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on August 12, 2008. Mr. Ostlund participated. Store Manager Mark McQuade represented the employer and presented additional testimony through Area Supervisor Cheri Svestra. Exhibits One through Eight and Exhibit A were received into evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Nathan Ostlund was employed by Casey's Marketing Company as a full-time sales associate from October 3, 2006 until June 23, 2008, when Store Manager Mark McQuade discharged him. Mr. McQuade became Mr. Ostlund's supervisor in October 2006. Mr. Ostlund had worked at the Handimart located at the same location, prior to Casey's purchase of the business establishment.

The final incident(s) that prompted the discharge occurred on June 19, 2008. Mr. Ostlund was scheduled to work 1:00 to 10:00 p.m. Another employee was scheduled to work until 8:00 p.m. Two other employees were scheduled to work until 11:00 p.m. Throughout his shift, Mr. Ostlund engaged in horseplay and other non-productive conduct instead of performing his work duties. Mr. Ostlund had had a disagreement with his girlfriend prior to his shift. Throughout the shift, Mr. Ostlund repeatedly sent text messages to his girlfriend and received text messages from his girlfriend. After receiving one of the text messages, Mr. Ostlund bear hugged coworker Ian Mascal to vent frustration about his relationship with his girlfriend. During the shift, Mr. Ostlund sat on the counter next to the cash register. During the shift, Mr. Ostlund made several brief trips to the cooler. The short-length and frequency of the trips indicated that Mr. Ostlund was visiting the cooler for reasons other than the performance of his work duties. During the shift, Mr. Ostlund engaged in horseplay involving another clerk's cash register. During the shift,

Mr. Ostlund engaged in horseplay involving the employer's P.A. system. Mr. Ostlund had previously been reprimanded for horseplay involving the cash registers and for horseplay involving the P.A. system. Mr. Ostlund left work at his scheduled quit time, 10:00 p.m. Mr. Ostlund left many of his assigned duties undone or half-done. Because Mr. Ostlund had not completed his assigned duties, the two remaining employees had to stay an extra hour past their scheduled quit time to complete duties that Mr. Ostlund neglected.

On June 20, Mr. Mascal complained to Store Manager Mark McQuade about having to stay late on June 19 because Mr. Ostlund had not done his job. Mr. Mascal told Mr. McQuade about the bear hug and that he thought the conduct was inappropriate. Mr. Mascal told Mr. McQuade that he thought Mr. Ostlund was intoxicated during the shift. Mr. Ostlund was next scheduled to work on June 21. Mr. McQuade notified Mr. Ostlund that he would be suspended until Monday, June 23, while the employer investigated some incidents. Mr. McQuade reviewed surveillance video, which supported Mr. Mascal's complaint. The video surveillance revealed the various means, outlined above, by which Mr. Ostlund avoided performing work on June 19. Mr. McQuade interviewed employee Laura Scarce, who had left at 8:00 p.m. on June 19. Ms. Scarce indicated she did not notice anything unusual, but that she had been working exclusively in the Blimpie or kitchen area of the store. Mr. McQuade attempted to interview employee Bannen Davis, who had little to say.

On June 23, Mr. McQuade notified Mr. Ostlund that he was discharged from the employment. In making the decision to discharge Mr. Ostlund, Mr. McQuade considered prior reprimands. In April 2007, Mr. McQuade reprimanded Mr. Ostlund for repeatedly failing to perform assigned duties in connection with unloading a freight truck and putting the freight away. Mr. Ostlund had intentionally failed to perform the assigned duty because he thought it was unfair that the work had been assigned to him. However, Mr. Ostlund's normal duties involved unloading freight trucks and putting the freight away. In November 2007, Mr. McQuade had reprimanded Mr. Ostlund and Mr. Mascal for horseplay involving the cash registers. In January 2008, Mr. McQuade reprimanded Mr. Ostlund for repeatedly failing to clean a counter area despite repeated directives to do so.

REASONING AND CONCLUSIONS OF LAW:

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.

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

The greater weight of the evidence establishes that Mr. Ostlund intentionally neglected his assigned duties on June 19, 2008 and instead engaged in horseplay and other non-work-related conduct. The greater weight of the evidence indicates that Mr. Ostlund had a history of intentionally neglecting his assigned duties. The evidence establishes a pattern of negligence sufficiently recurrent to demonstrate a willful and wanton disregard of the interests of the employer.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Ostlund was discharged for misconduct. Accordingly, Mr. Ostlund is disqualified for benefits 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 employer's account shall not be charged for benefits paid to Mr. Ostlund.

DECISION:

The Agency representative's July 21, 2008, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs