

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NICHOLAS WEIH
Claimant

APPEAL NO: 12A-UI-10055-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING COMPANY
Employer

OC: 07/15/12
Claimant: Respondent (2/R)

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

STATEMENT OF THE CASE:

Casey's Marketing Company (employer) appealed an unemployment insurance decision dated August 8, 2012, reference 01, which held that Nicholas Weih (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 13, 2012. The claimant participated in the hearing. The employer participated through Diana Fossum, Area Manager. Employer's Exhibits One through Seven were admitted into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

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 as a full-time clerk on February 27, 2009. He became an assistant manager and was promoted to a store manager in November 2011. The employer's job description for the store manager position provides a detailed list of duties each manager is required to complete and the claimant had access to this job description. The claimant was discharged on July 17, 2012 for repeatedly failing to follow directives. In 2012, he received a written warning on January 20, a verbal warning on June 1, and a final written warning on June 25, at which time he was suspended for three days.

The claimant's shelves were not stocked or cleaned on January 20 and his security log book was not up to date. The area manager counseled him about using a vendor card on June 1. On June 25, the security log book had not been filled out since June 13 and more than six days of cigarette audits had not been completed. The vendor card was used on June 18 and an invoice from A&E dated June 21 was on the desk, had not been "RPO'd in" and had not been paid. The ice machine had not been cleaned since March and completed employment

applications were thrown on the floor and on the desk. Day sheets were not grouped together and an employee was working in blue jeans, which is contrary to policy.

Store managers are required to have four weeks schedules posted and the claimant went on vacation on July 5, 2012 through July 7, 2012 but only had two weeks schedules posted and some shifts were missed on those. The area manager had to go to the claimant's store and post another two weeks schedules so the employees would know when they had to work. Two payrolls were missing in May 2012 when the area manager went in to audit them and an employee named Amanda found them on July 5, 2012. However, the area manager could not audit them as there were no payroll notes on them. Stock counts on beer are to be completed weekly and sent to the area manager on Fridays. The claimant's last beer count was done on May 15, 2012.

Store managers are required to send the area manager on Tuesdays but the claimant failed to send these reports on June 26, July 3 and July 10, 2012. The area manager received an email on July 12, 2012 stating that the claimant's May 2012 coupons had not been processed. They are to be sent on the first grocery truck after the end of the month. She sent him an email asking about them and he replied that they were sent on the truck before last, which would have been on July 2, 2012, which was a month late. He said he did not realize they were missing but found them after reorganizing a cabinet. The claimant was discharged the following week.

The claimant filed a claim for unemployment insurance benefits effective July 15, 2012 and has received benefits after the separation from employment.

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.

Iowa Code § 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 to prove the discharged employee is disqualified for benefits due to work-related misconduct. *Sallis v. Employment Appeal Bd.*, 437 N.W.2d 895, 896 (Iowa 1989). The claimant was discharged on July 17, 2012 for repeatedly failing to follow directives and not performing his job duties. He had been advised his job was in jeopardy as a result of his failure to perform his job duties as required. Repeated failure to follow an employer's instructions in the performance of duties is misconduct. *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). The claimant's failure to do his work as required is a violation of the duties and responsibilities the employer has the right to expect of an employee. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

Iowa Code § 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code § 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The unemployment insurance decision dated August 8, 2012, 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 matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/css