

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHAD ANEWEER
Claimant

APPEAL NO: 09A-UI-09365-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING CO
Employer

OC: 05/17/09
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 June 18, 2009, reference 01, which held that Chad Aneweer (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 July 16, 2009. The claimant participated in the hearing. The employer participated through Victoria Wymore, Store Manager. Employer's Exhibits One through Three 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 employer discharged the claimant for work-related misconduct.

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 employed as a part-time cook/cashier from October 12, 2008 through May 18, 2009 when he was discharged for misconduct. He had multiple corrective action statements in his short period of employment. The claimant received his first written warning on December 19, 2008 for failing to follow policies on December 16, 2008 which resulted in three 'drive-offs' totaling \$45.49. He failed to log the cars in the at the gas pumps and failed to ask each customer at the cash register whether they had fuel. A second written warning was issued to him on April 1, 2009 for failing to follow safety policies on March 17, 2009 and March 24, 2009. Both employees who work the end of the night shift are required to ensure the doors are locked when the lights are turned off and the money in the cash register is counted. The claimant and another employee were both counseled for failure to lock the front door before turning off the lights on these two dates. Violation of this policy subjects the employees to a risk of robbery, theft or bodily harm.

A third written warning was issued to the claimant on April 11, 2009 for failing to complete his duties on April 10, 2009. He failed to complete the prep table and the scale. He did not clean

the dishes, the fryer or the floors and did not stock products or make the pizza dough for the following day. The store manager issued a group warning to all employees to ensure the pizza phone ringer was not turned off since it had apparently become a problem. The employees were put on notice that they had to ensure the ringer was turned on during each shift.

The employees arriving at work on May 18, 2009 noticed the pizza phone ringer was not turned on and no calls could come through. The store manager looked into the matter and determined that the claimant was the pizza cook on the previous night. There were no pizza orders after 9:19 p.m. and the manager determined the claimant had turned off the ringer. While the manager was discussing the matter with the claimant, a customer called in to complain about the claimant's use of profanity on the night before. The claimant was using the "F-word" and when the customer informed the claimant he could be heard, the claimant responded with the same profanity and stated that since he worked there, he could say whatever he wanted to say. He was discharged at that time.

The claimant filed a claim for unemployment insurance benefits effective May 17, 2009 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 claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant was discharged for repeated disciplinary warnings with the final incidents on May 17, 2009 when he turned off the pizza phone ringer and used profanity in front of a customer. He denies using profanity but it was confirmed he had, since the customer described him and the other employee looks completely different. The claimant also denies turning off the phone but even if he did not do it, he was on notice to insure it was turned on. Any reasonable person would have suspected the phone was turned off when there were no further calls for pizza after 9:19 p.m. The claimant demonstrated a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. 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 June 18, 2009, 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/pjs