IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

SANDRA A CLUCK
Claimant

CASEY'S MARKETING COMPANY
Employer

APPEAL NO. 17A-UI-06289-S1-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 05/28/17
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Sandra Cluck (claimant) appealed a representative's June 16, 2017, decision (reference 01) that concluded she was not eligible to receive unemployment insurance benefits after her separation from employment with Casey's Marketing Company (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for July 10, 2017. The claimant was represented by Krystal Cluck, non-attorney representative, and participated personally. The employer participated by Bo Knop, District Manager, and Roxanne Anderson, Area Supervisor. The employer offered and Exhibit 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 June 1, 2001, and at the end of her employment she was working as a full-time store manager. The claimant signed that the employer's handbook was made available to her on June 1, 2001. The handbook did not address release of employee information or confidentiality.

On February 5, 2009, the employer issued the claimant a verbal warning because the cigarette audits were incorrect. The employer notified the claimant that further infractions could result in termination from employment. The claimant worked seven days per week to find out which employee was stealing cigarettes from the store. On April 28, 2009, the employer issued the claimant a written warning for writing two insufficient fund checks. The claimant did not realize she had overdrawn. She immediately took care of the funds and fees.

The claimant did not receive any other warnings for years. On December 16, 2016, the employer issued the claimant a written warning for not reporting a missing pump key to her supervisor immediately. She mistakenly thought reporting the issue to the service department was correct. The employer notified the claimant that further infractions could result in

termination from employment. On March 31, 2017, the employer issued the claimant a written warning for not moving an employee to full-time who had worked overtime hours for three weeks. The claimant knew she was supposed to do this but lacked the training in the employer's new system to access the program. She asked for training in writing but the employer did not respond. The employer notified the claimant that further infractions could result in termination from employment.

At some point the employer issued the claimant a performance evaluation. It listed six areas of improvement in a developmental plan. Neither the claimant nor the employer signed off on the six areas of improvement and the claimant was not given a copy of the document. Even so, the claimant worked on the areas and followed the employer's instructions.

On May 19, 2017, the claimant told an employee to sit across the street for one hour to see how many times a co-worker took a smoke break. There was no camera outside the store to capture the information. On May 22, 2017, a specific beer had not been placed in the location the area supervisor indicated. On May 22, 2017, the claimant told a customer about an employee's husband's medical condition. The customer was the employee's sister. On May 25, 2017, the employer terminated the claimant for not following the plan and poor customer relations skills. The employer thought the claimant was unable to consistently improve.

REASONING AND CONCLUSIONS OF LAW:

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

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.

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 was a result of her lack of training or ability to understand the instructions. Consequently the employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's June 16, 2017, decision (reference 01) is reversed. 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/rvs