

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

PATRICIA KELLY

Claimant

APPEAL NO: 14A-UI-03016-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEYS MARKETING COMPANY

Employer

OC: 02/16/14

Claimant: Respondent (2)

Section 96.5-2-a – Discharge/Misconduct

Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 10, 2014, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on April 10, 2014. The claimant participated in the hearing. Stephanie Swan-Johansen, Store Manager and Alicia Weber, TALX Representative/witness regarding the employer's participation in the fact-finding interview, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time clerk for Casey's from September 23, 2012 to January 9, 2014. She worked the 10:00 p.m. to 5:00 a.m. shift. The claimant was discharged after Store Manager Stephanie Swan-Johansen, who was watching surveillance footage regarding another matter, observed the claimant violate several store policies. The claimant wore sweat pants to work four times, made a sub sandwich and did not pay for it on one occasion, and left unsecured cash on a shelf under a window where anyone who entered the store could grab it instead of placing it in the safe as required by the employer's policy four times during the span of time Ms. Swan-Johansen was watching. Additionally, it was noted that the claimant took frequent cigarette breaks and did not always go back in the store when a customer entered, if she was outside, although she could plainly see the customer. The claimant received a verbal warning in writing August 14, 2013, for taking too many breaks. She also received a written warning on that date because she had two gas drive-offs and after reviewing the video the employer determined the claimant was not paying attention to the gas pumps when the customers who drove off were there and in one case the claimant turned the gas pump on and then went toward the back of the store and sat on the floor to clean shelves. Finally, the employer received numerous complaints from other staff members and customers' stating the claimant was "grouchy and rude." The claimant talked to the claimant about her demeanor

during her September 23, 2013, performance evaluation and withheld her raise for 30 days because of her attitude toward customers. After watching the video surveillance footage and noting the above-stated issues, the employer terminated the claimant's employment January 9, 2014.

The claimant has claimed and received benefits since her separation from this employer.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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 claimant was aware of the employer's dress code but substituted her own judgment for that of the employer when she chose to wear sweat pants to work on at least four occasions during early January 2014. She also knew the employer required employees to pay for food before consuming it and she failed to do so at least once that the employer learned about while watching the video. She was familiar with and understood the employer's cash handling policies but left unsecured cash out where anyone entering the store could reach/take it for several hours at a time on at least four occasions. She took more breaks than allowed, despite a previous warning for that conduct, but more importantly and more disturbing, she failed to always return to the store when she was outside taking a break and a customer went in the

store. Lastly, the employer had complaints about the claimant being rude to customers and co-workers.

The claimant worked the overnight shift and while the employer needs to be able to trust all of its employees, given that there is less supervision on the third shift, the employer needs employees it can depend on to follow its policies on the overnight shift. The claimant willfully ignored policies she did not agree with and was not a responsible steward of the store during the overnight hours she worked.

Under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits are denied.

871 IAC 24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if un rebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)"b" as amended by 2008 Iowa Acts, Senate File 2160.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3-7-a, -b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits.

Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

The employer's representative provided documentation to the fact finder and joined in the fact-finding interview, with the claimant on the phone as well, March 7, 2014, at 8:49 a.m. Consequently, the employer is deemed to have participated in the fact-finding hearing under the meaning of the law and the claimant's overpayment of benefits cannot be waived.

DECISION:

The March 10, 2014, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The claimant has been overpaid benefits in the amount of \$1,480.00.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/css