

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ZACHARY B SANKEY
Claimant

APPEAL NO: 13A-UI-13924-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING COMPANY
Employer

OC: 10/27/13

Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Zachary B. Sankey (claimant) appealed a representative's December 9, 2013 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a 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 held on January 14, 2014. The claimant participated in the hearing and presented testimony from two other witnesses, Lacy White and Jacob Meyer. Sue Mickelson appeared on the employer's behalf. 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:

Was the claimant discharged for work-connected misconduct?

OUTCOME:

Reversed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on April 11, 2013. Since about September 25, 2013 he worked full time as a kitchen worker at the employer's Mason City, Iowa store. His last day of work was October 15, 2013. The employer discharged him on that date. The reason asserted for the discharge was theft of some cough drops.

On October 9 the claimant had a cough, and had even gotten a customer complaint that he should not be working around food if he was coughing. He called the store manager to ask if he should go home, and she indicated there was no one to replace him. He then got a bag of cough drops from store inventory and went to the cashier. He told her she should waste out the cough drops as for "in store use." This was the practice that had been followed in the past for other medical supplies that might be needed by staff, such as ibuprofen. At some point the cashier told the claimant that she could not "waste out" the cough drops; the employer asserts

that this was initially when the claimant first came to her with the cough drops, but the claimant testified that the cashier had attempted to perform the transaction and only later told him that she could not waste them out, meaning not that it was not permitted, but that she was technically not able to enter the transaction.

The claimant took a couple of cough drops from the bag and used them as he finished his shift in the kitchen; he left the rest of the bag at the cash register. The employer subsequently learned he had taken the cough drops and determined to discharge him for theft.

REASONING AND CONCLUSIONS OF LAW:

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. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). The gravity of the incident and the number of prior violations or prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation.

The reason cited by the employer for discharging the claimant is that he stole the cough drops he used in the store on October 9. Misconduct connotes volition. *Huntoon*, supra. In order to establish the necessary element of intent, final incident must have occurred despite the claimant's knowledge that the conduct could result in the loss of his job. *Cosper*, supra; *Higgins v. IDJS*, 350 N.W.2d 187 (Iowa 1984). The claimant's taking of the cough drops and asking that they be "wasted" for "in store use" was consistent with the employer's prior practices in the store; he was unaware that doing as he did on October 9 would be considered theft and would result in his discharge. Under the circumstances of this case, the claimant's taking and use of the cough drops was at worst the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence in an isolated instance, and was a good faith error in judgment or discretion.

The employer has not met its burden to show disqualifying misconduct. *Cosper*, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's December 9, 2013 decision (reference 01) is reversed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs