

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MICHELLE R SCHNELLER

Claimant

APPEAL NO: 12A-UI-15112-DWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING COMPANY

Employer

OC: 11/25/12

Claimant: Respondent (1)

Iowa Code § 96.5(2)a - Discharge

PROCEDURAL STATEMENT OF THE CASE:

The employer appealed a representative's December 17, 2012 determination (reference 01) that held the claimant qualified to receive benefits and the employer's account subject to charge because the claimant's employment separation was for nondisqualifying reasons. The claimant participated in the hearing. Nancy Kirsch, the store manager, appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge finds the claimant qualified to receive benefits.

ISSUE:

Did the employer discharge the claimant for reasons constituting work-connected misconduct?

FINDINGS OF FACT:

The employer hired the claimant on September 24, 2012, to work as a part-time cook.

On November 8, the claimant and another co-worker were behind the counter. A male customer, who the claimant personally knew, was the only customer in the store. The three of them were goofing around when the claimant pulled her shirt apart as if to expose her breasts, but she had an undershirt on. The customer leaned toward the claimant as if he was looking at her breasts.

Between November 8 and 26, co-workers made jokes about the claimant flashing her breasts at a customer. The claimant asked what they meant because she had done this. Kirsch heard rumors about this incident and reviewed the video on November 8. Based on the side angle of the incident, she concluded the rumors were true. From the video, Kirsch did not see a breast or if the claimant had on an undershirt.

On November 26, 2012, the employer talked to the claimant about this incident. The claimant denied she had opened her shirt to flash her breasts at a customer. Even though the claimant's job was not in jeopardy before Kirsch learned about the November 8, the employer discharged the claimant for her inappropriate conduct on November 8, 2012.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges her for reasons constituting work-connected misconduct. Iowa Code § 96.5(2)a. 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 propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 665 (Iowa 2000).

The law defines misconduct as:

1. A deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment.
2. A deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees. Or
3. An intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer.

Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion do not amount to work-connected misconduct. 871 IAC 24.32(1)(a).

The employer admitted that when she watched the video, she could not see the claimant's breasts or if the claimant had an undershirt on as the claimant testified. Since neither the customer nor the co-worker testified, the claimant's testimony that she did not "flash" the customer, a friend of hers, is credible. The evidence does not establish that the claimant exposed her breasts on November 8. The claimant's conduct on November 8 was inappropriate and she used extremely poor judgment while engaging in horseplay. The claimant was goofing around with friends while she was working. Since her job was not in jeopardy before this incident, this isolated incident of poor judgment does not rise to the level of work-connected misconduct. As of November 25, 2012, the claimant is qualified to receive benefits.

The employer is not one of the claimant's base period employers. During her current benefit year, the employer's account will not be charged.

DECISION:

The representative's December 17, 2012 determination (reference 01) is affirmed. The employer discharged the claimant for justifiable business reasons. The claimant's poor judgment on November 8 does not rise to the level of work-connected misconduct. As of November 25, 2012, the claimant is qualified to receive benefits, provided she meets all other eligibility requirements. During the claimant's current benefit year, the employer's account will not be charged.

Debra L. Wise
Administrative Law Judge

Decision Dated and Mailed

dlw/css