

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SHARON K FROMMELT
Claimant

APPEAL NO. 11A-UI-00062-SWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING COMPANY
Employer

**OC: 11/28/10
Claimant: Appellant (4)**

Section 96.5-2-a – Discharge
Section 96.4-3 – Able to and Available for Work

STATEMENT OF THE CASE:

The claimant appealed an unemployment insurance decision dated December 27, 2010, reference 01, that concluded she was discharged for work-connected misconduct. A telephone hearing was held on February 11, 2011. The parties were properly notified about the hearing. The claimant participated in the hearing with her attorney, Michael McEnroe. Mary Hanrahan participated in the hearing on behalf of the employer. Exhibits One and Two were admitted into evidence at the hearing. The parties agreed that the issue of whether the claimant was able to and available for work could be considered and decided in this case.

ISSUES:

Was the claimant discharged for a current act of work-connected misconduct?

Was the claimant able to and available for work?

FINDINGS OF FACT:

The claimant worked as a donut maker from the employer from December 14, 2007, to October 19, 2010. The claimant was informed and understood that under the employer's work rules, employees could be discharged for taking merchandise without paying for it. After October 19, the claimant was off work on medical leave due to carpal tunnel problems, which eventually required surgery. She had offered to return to work, but the store manager, Kathy Haskell, said the employer could not accommodate her restrictions.

On November 12, 2010, the claimant went to the store to get some cigarettes. After she paid for the cigarettes, the clerk told her that they were out of the matches. The clerk suggested she just take one of the 99-cent lighters that the employer had for sale. She took the lighter without paying for it.

On November 15, 2010, the claimant came back into the store with the lighter to talk to Haskell. She told Haskell what had happened and offered to return the lighter or pay for it. The manager appeared angry but went back to his office without saying anything to the claimant. The

claimant left the lighter. The claimant came into the office again on November 24, 2010, to provide Haskell with updated medical restrictions. Haskell thanked the claimant and said nothing to her about the lighter situation. Haskell has the authority to discharge employees.

The claimant was called into the store on December 1, 2010, for a meeting with the area manager, Mary Hanrahan, Haskell, and the clerk who was in the store on November 11. The claimant explained to Hanrahan what had happened. The clerk denied telling the claimant to take the lighter.

Hanrahan discharged the claimant on December 1, 2010, for unauthorized removal of company property.

The claimant filed a new claim for unemployment insurance benefits with an effective date of November 28, 2010.

As of November 28, 2010, the claimant was under a doctor's care with restrictions of no lifting, pushing, pulling, carrying greater than two pounds with either arm and no firm repetitive gripping or squeezing with either hand. She had carpal tunnel surgery on her right wrist on December 14, 2010, and afterward was totally restricted from working for approximately three weeks. She then was on restrictions of not lifting anything heavier than a coffee cup with her right hand for about a week. As of January 10, 2011, she was given a full release without restrictions.

The claimant has a high school degree and some college work. She has worked as a nursing home worker in the job of certified nurse's aide and activities director. She has also worked as a cashier and donut maker. Other than the time when the claimant was taken totally off work, she could have worked as a cashier and activities director, with her restrictions.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

The unemployment insurance law disqualifies claimants discharged for work-connected misconduct. Iowa Code § 96.5-2-a. The rules define misconduct as (1) deliberate acts or omissions by a worker that materially breach the duties and obligations arising out of the contract of employment, (2) deliberate violations or disregard of standards of behavior that the employer has the right to expect of employees, or (3) carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design. 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 misconduct within the meaning of the statute. 871 IAC 24.32(1).

871 IAC 24.32(8) provides: "While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act."

The claimant's conduct—whether the clerk told her to do it or not—would be a willful work rule violation and violation of the standards of honest behavior that the employer has the right to expect of employees. But the store manager, who has the power to fire, was aware of the conduct almost right way and the claimant was not discharged at that point for this conduct. When the claimant was discharged over two weeks later, this was no longer a current act. The

fact that a higher up manager decided later that the conduct warranted termination does not make the discharge for a current act. The claimant is qualified for benefits based on this separation from employment.

The final issue in this case is whether the claimant is able to work, available for work, and earnestly and actively seeking work as required by the unemployment insurance law in Iowa Code § 96.4-3. The unemployment insurance rules provide that a person must be physically able to work, not necessarily in the individual's customary occupation, but in some reasonably suitable, comparable, gainful, full-time endeavor that is generally available in the labor market. 871 IAC 24.22(1)b. The evidence establishes that, except for the period from December 14, 2010, through January 4, 2011, the claimant was able to perform gainful work, just not work that requires substantial lifting. There is work available in the labor market meeting such restrictions that the claimant is qualified to perform, and the claimant has been actively looking for such work in compliance with the requirements of the law. Availability is based on a major of the calendar week. The claimant was eligible for benefits from November 28 through December 11, 2010. She was ineligible for the period between December 12, 2010, and January 1, 2011. She was again eligible for benefits effective January 2, 2011, and afterward.

DECISION:

The unemployment insurance decision dated December 27, 2010, reference 01, is modified in favor of the claimant. The claimant is qualified to receive unemployment insurance benefits based on the reasons for her separation from employment. . The claimant was (1) eligible for benefits from November 28 through December 11, 2010; (2) ineligible from December 12, 2010, through January 1, 2011; and (3) again eligible for benefits effective January 2, 2011, and afterward.

Steven A. Wise
Administrative Law Judge

Decision Dated and Mailed

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