

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**VIRLENE K PINGEL**  
Claimant

**APPEAL NO: 08A-UI-01567-DT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CASEY'S MARKETING COMPANY**  
Employer

**OC: 01/13/08 R: 01**  
**Claimant: Respondent (1)**

Section 96.5-2-a – Discharge  
Section 96.7-2-a(2) – Charges Against Employer's Account

**STATEMENT OF THE CASE:**

Casey's Marketing Company (employer) appealed a representative's February 7, 2008 decision (reference 01) that concluded Virlene K. Pingel (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 3, 2008. The claimant participated in the hearing. Lori Kelso 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.

**ISSUES:**

Was the claimant discharged for work-connected misconduct? Is the employer's account subject to charge?

**FINDINGS OF FACT:**

The claimant started working for the employer on October 9, 2007. She worked approximately 32 to 40 hours per week as a kitchen worker at two of the employer's Fort Dodge, Iowa stores. Her last day of work was January 10, 2008. The employer discharged her on January 11, 2008. The reason asserted for the discharge was allegedly making a threatening remark regarding one of the store managers.

In late November or early December there had been a confrontation between a customer and one of the store clerks in which the claimant had been buzzed out by the store clerk to provide assistance. Shortly thereafter there was a subsequent discussion between the claimant and Ms. Kelso, the store manager, regarding whether the claimant had acted appropriately when she became involved with the unruly customer.

A few days prior to January 11 an employee reported to Ms. Kelso that the claimant had commented to her and to the store clerk involved in the incident with the customer that when Ms. Kelso had discussed the matter of the unruly customer that it was "lucky that Lori didn't say

anything else” because she was “getting ready to punch” Ms. Kelso. Ms. Kelso then spoke to the other store clerk who repeated essentially the same substance. As a result, Ms. Kelso determined to discharge the claimant for violation of the harassment policy. Both when confronted and at the hearing the claimant denied making any such statement regarding Ms. Kelso. There had been some bad feelings between the claimant and at least the store clerk involved in the situation.

## **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).

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.

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 focus of the definition of misconduct is on acts or omissions by a claimant that “rise to the level of being deliberate, intentional or culpable.” Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer’s interest, such as found in:
  - a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
  - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
  - a. Manifest equal culpability, wrongful intent or evil design; or
  - b. Show an intentional and substantial disregard of:
    1. The employer’s interest, or
    2. The employee’s duties and obligations to the employer.

Henry, supra.

The reason cited by the employer for discharging the claimant is the claimant’s alleged comment about being ready to punch Ms. Kelso. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant made such a statement. The employer relies exclusively on the second-hand account from the two other store employees; however, without that information being provided first-hand, the administrative law judge is unable to ascertain whether one or the other might have been mistaken, whether they are credible, or whether the employer’s witness might have misinterpreted or misunderstood aspects of their reports. Under the circumstances of this case, the administrative law judge finds the claimant’s first-hand denial to be more credible. 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.

The final issue is whether the employer’s account is subject to charge. An employer’s account is only chargeable if the employer is a base period employer. Iowa Code § 96.7. The base period is “the period beginning with the first day of the five completed calendar quarters immediately preceding the first day of an individual’s benefit year and ending with the last day of the next to the last completed calendar quarter immediately preceding the date on which the individual filed a valid claim.” Iowa Code § 96.19-3. The claimant’s base period began October 1, 2006 and ended September 30, 2007. The employer did not employ the claimant during this time, and therefore the employer is not currently a base period employer and its account is not currently chargeable for benefits paid to the claimant.

**DECISION:**

The representative's February 7, 2008 decision (reference 01) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible. The employer's account is not subject to charge in the current benefit year.

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Lynette A. F. Donner  
Administrative Law Judge

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Decision Dated and Mailed

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