

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

GUY FROHLING
Claimant

APPEAL NO: 14A-UI-07250-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEYS MARKETING COMPANY
Employer

OC: 06/15/14
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 July 8, 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 August 6, 2014. The claimant participated in the hearing. Renee Aldrich, Store Manager and Patrick Bissell, Area Manager, participated in the hearing on behalf of the employer. Alicia Weber, Unemployment Representative, participated in the hearing solely as a witness to whether the employer participated in the fact-finding interview.

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 first assistant manager for Casey's from September 23, 2013 to June 16, 2014. He was discharged for allowing a customer to consume alcohol in the store.

On June 12, 2014, a customer entered the store at approximately 10:20 p.m. and asked the claimant to get her a pint of vodka from the locked liquor cabinet in the back of the store. The claimant went back to get the alcohol and the customer went to the employer's fountain drink area and got a coffee cup. It is not clear whether she filled her cup with a fountain drink or ice or both but she returned to the counter where the claimant rang up the vodka and a pack of cigarettes for her but did not charge her for the cup and whatever was in the cup. After making her purchase the customer stood at the counter, opened the vodka and poured it in the cup in front of the claimant who was waiting on another customer who was also a part-time employee.

The female customer then stood at the counter, talking to the claimant, drinking from the cup, for the next 30 minutes while he prepared to close the store at 11:00 p.m. They left the store for about ten minutes and went to his car because the customer told the claimant her ride left her and he volunteered to let her use his cell phone, which was in his car, and he offered her a ride home. The claimant then finished his closing duties and they left.

The part-time employee reported the situation to Store Manager Renee Aldrich who reported the incident to Area Supervisor Patrick Bissell. Mr. Bissell stopped in the store and reviewed the video surveillance June 16, 2014, and took a statement from the part-time employee who witnessed the incident. Mr. Bissell then spoke to human resources and received permission to terminate the claimant's employment. The claimant came in about 1:30 p.m. to work his shift and Mr. Bissell talked to him about the situation and he explained what happened which effectively confirmed the part-time employee's account as well as the video recording of the incident. Mr. Bissell notified the claimant his employment was being terminated for allowing the customer to consume alcohol in the store despite being aware that was not only a violation of the employer's policy but also illegal.

The employer participated in the fact-finding interview personally through the statements of Alicia Weber, Employer Representative, who also provided documentation to the fact-finder.

The claimant has claimed and received benefits in the amount of \$664.00 since his 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 § 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The claimant was aware the customer went to get a cup while he went to get the vodka she requested to buy. He was also aware she opened the vodka bottle and poured it into the cup after paying for the alcohol and that she stood there drinking from the cup for at least 30 minutes. Throughout the time the customer was in the store after purchasing the vodka, the claimant knew, or should have known, her actions were in violation of the employer's policy and also illegal. Despite that knowledge he allowed her to remain in the store illegally drinking alcohol.

While the claimant may have had sympathy for the customer as her ride left her and she told him she had a fight with her boyfriend and it is unfortunate she may have taken advantage of his attempt at kindness, the claimant was aware of the employer's policy and the law regarding this situation and did not prevent it from occurring. Instead of allowing her to remain in the store, he could have allowed her to wait in his car after he offered her a ride home but he failed to do so.

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 must be denied.

Iowa Admin. Code r. 871-24.10 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 unrebutted 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 unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be

recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. In this case, the claimant has received benefits but was not eligible for those benefits. While there is no evidence that the claimant received benefits due to fraud or willful misrepresentation, the employer participated in the fact-finding interview personally through the statements of Employment Representative Alicia Weber and she also provided documentation to the fact-finder. Consequently, the claimant's overpayment cannot be waived and he is overpaid benefits in the amount of \$664.00.

DECISION:

The July 8, 2014, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided she is otherwise eligible. The claimant is overpaid benefits in the amount of \$664.00.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs