

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JERRY D HUPP**

Claimant

**APPEAL NO: 15A-UI-07359-LDT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CASEY'S MARKETING COMPANY**

Employer

**OC: 05/31/15**

**Claimant: Respondent (1)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

Casey's Marketing Company (employer) appealed a representative's June 16, 2015 decision (reference 01) that concluded Jerry D. Hupp (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 July 31, 2015. The claimant participated in the hearing. Bill Brauer 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:**

Affirmed. Benefits allowed.

**FINDINGS OF FACT:**

The claimant started working for the employer on May 18, 2011. He worked full time as a heavy duty warehouse person on the third shift in the employer's Ankeny, Iowa warehouse. His last day of work was the shift from the evening of February 13 into the morning of February 14, 2015. The employer discharged him on April 29, 2015. The reason asserted for the discharge was failing to disclose criminal convictions on his job application.

The claimant had gone onto a period FMLA (Family Medical Leave) as of February 17, 2015. While the leave was set to expire on April 19, the claimant had been told he could have an additional two weeks, to extend through May 3. However, sometime during this period the employer learned that the claimant was in jail. As a result, the employer did some further background checking, and discovered that the claimant had about six criminal convictions prior to March 29, 2011 when he made his application. The employer was primarily concerned about one of these, a conviction for domestic abuse assault in April 2004. As indicated by the claimant's supervisor on April 29 when he called to discharge the claimant, and by Brauer, the

warehouse manager, when asked during the hearing which of the convictions were felonies, the employer mistakenly concluded that this was a felony conviction; in fact, it was an aggravated misdemeanor, for which the claimant did in fact two years in prison.

The question on the application was whether the applicant had ever been convicted of a crime, to which the claimant answered "no." The claimant acknowledged that he had answered the question incorrectly, but could provide no explanation as to why he would have done so. He had been told by Brauer when he applied for the job that there would be a criminal background check. The employer, however, determined not to perform the background check at that time.

While the claimant did not correctly answer the question on the application, he had not sought to conceal the conviction from the employer and had in fact shared with his supervisors since at least 2012 the fact that he had served time in prison. The supervisors did not express any concern over the fact that he must have had some type of serious criminal conviction if he had served time in prison.

However, when the employer finally decided to perform a background check in the spring of 2015, it found the prior convictions, particularly the domestic abuse assault conviction, and determined to discharge the claimant.

#### **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. Rule 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. Rule 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. Rule 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is his failure to disclose prior criminal convictions on his job application. First, it appears that the employer's actions were at least in part based on a mistaken belief that at least one of the claimant's prior convictions was for a felony, which it was not. Next, while the claimant did fail to disclose his prior convictions, this does not end the inquiry. In order to make the failure to disclose the prior convictions a matter of work-connected misconduct, the false statement must endanger the health, safety or morals of the applicant or others or result in exposing the employer to legal liabilities or penalties or result in placing the employer in jeopardy. The only exposure identified by the employer was a generic concern about not hiring someone with a conviction for a violent act, in part because there was an on-site childcare center. Further, the Supreme Court has ruled that a misrepresentation on a job application must be materially related to job performance to disqualify a claimant from receiving unemployment insurance benefits. *Larson v. Employment Appeal Board*, 474 N.W.2d 570 (Iowa 1991). Although the court did not define materiality, it cited *Independent School District v. Hanson*, 412 N.W.2d 320 (Minn. App. 1987), which stated that a misrepresentation is not material if a truthful answer would not have prevented the person from being hired. The employer again pointed to the conviction for the domestic abuse assault as one that would preclude him from being hired. However, the employer knew or should have known of the claimant's conviction for this offense because the claimant had openly admitted to several supervisors as far back as at least three years ago that he had been in prison, and none of those supervisors expressed any concern as to the claimant's ability to continue in his employment. Therefore, the administrative law judge concludes that the claimant's act of falsification on his application was not misconduct and, as a consequence, he is not disqualified for unemployment insurance benefits.

Further, even if the failure to disclose might otherwise be considered to be misconduct, there is no current act of misconduct as required to establish work-connected misconduct. Rule 871 IAC 24.32(8); *Greene v. Employment Appeal Board*, 426 N.W.2d 659 (Iowa App. 1988). The failure to disclose occurred over four years prior to the employer's discharge of the claimant, and as the claimant had shared with his prior supervisors that he had served time in prison by about the first year of his employment, if the employer had some concern about the claimant having criminal convictions, it was on notice that it should do the background check it had told the claimant would be done before he was hired so that it could have found out exactly why the claimant had been in prison.

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 June 16, 2015 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 he is otherwise eligible.

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Lynette A. F. Donner  
Administrative Law Judge

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Decision Dated and Mailed

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