

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

SHELLY S ANDERSON Claimant CASEY'S MARKETING COMPANY Employer	<div>68-0157 (9-06) - 3091078 - EI</div> <div>APPEAL NO: 12A-UI-10581-DT ADMINISTRATIVE LAW JUDGE DECISION</div> <div>OC: 08/05/12 Claimant: Respondent (1)</div>
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Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Casey's Marketing Company (employer) appealed a representative's August 24, 2012 decision (reference 01) that concluded Shelly S. Anderson (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 September 27, 2012. The claimant participated in the hearing and presented testimony from one other witness, Matthew Simmons. 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.

ISSUE:

Was the claimant discharged for work-connected misconduct?

OUTCOME:

Affirmed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on June 16, 2011. She worked part time (25 - 30 hours per week) as a cashier. Her last day of work was August 3, 2012. The employer discharged her on that date. The reason asserted for the discharge was the conclusion that the claimant had reported for work intoxicated in violation of the employer's drug and alcohol policy.

On August 3 the claimant was scheduled to work from 11:30 a.m. until 3:00 p.m.; unlike her normal cashier duties, that day she was scheduled to help unload the truck. Shortly after she reported for work she had a conversation with the store manager, Kelso, regarding an unusual transaction from the day before. Kelso observed that the claimant seemed to be confused, that her eyes appeared droopy, that she appeared to be swaying a little bit, and that she smelled unusually "sweet." She found it unusual that the claimant was chewing gum, which she normally did not do. Kelso thought the claimant might be under the influence of alcohol, and so summoned the store manager from another local store to come over. That store manager also

observed the smell, as did three other employees. Kelso concluded that the claimant was under the influence of alcohol. Rather than requiring the claimant to submit to an alcohol test as allowed by the employer's drug and alcohol policies, Kelso informed the claimant she was discharged.

The claimant denied that she was under the influence of alcohol. She acknowledged that she was chewing gum which she did not normally do on duty, but asserted that this was because she did not chew gum when she was working as a clerk dealing with customers, but this day she had decided to chew gum as she was unloading the truck and not working with customers. The claimant had consumed two or three beers with her supper on the evening of August 2, between about 5:30 p.m. and 7:00 p.m., and then had gone to bed at about 8:00 p.m. She denied consuming any other alcohol between then and reporting for work on August 3.

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. 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. 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. 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 the conclusion that she had reported for work under the influence of alcohol. The employer has established that it had a "reasonable suspicion" that the claimant might be under the influence of alcohol, and this would have supported requiring the claimant to submit to alcohol testing under the employer's drug and alcohol policy and Iowa Code § 730.5. However, "reasonable suspicion" does not alone establish by a preponderance of the evidence that the claimant was in fact under the influence of alcohol. The claimant has provided sufficient evidence to counter the inference which arose from the employer's reasonable suspicion. 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 August 24, 2012 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.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

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