

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JAMES J DALY
Claimant

APPEAL NO. 09A-UI-14457-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING COMPANY
Employer

OC: 08/30/09
Claimant: Respondent (2R)

Section 96.5-2-a – Misconduct
Section 96.3-7 – Recovery of Overpayment

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated September 18, 2009, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on October 22, 2009. Claimant participated. Employer participated by Maris Masengill, area supervisor. The record consists of the testimony of Maris Masengill; the testimony of James Daley; and Employer's Exhibits 1-16. Official notice was taken of the administrative file.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The claimant was the manager of the Casey's store in Waukee, Iowa. He was initially hired by Casey's on October 4, 2006, and promoted to manager in May 2008. He was terminated on August 31, 2009, for the inability to perform his job. Two aspects of the claimant's job performance were particularly responsible for his termination: his failure to do daily cigarette audits and the unacceptable condition of the store.

The claimant had been counseled in January 2009 and June 15, 2009, about the cleanliness of the store. He had been told that the kitchen, backrooms and bathrooms needed to be more thoroughly cleaned. Numerous suggestions were made to the claimant on how to improve the store. On June 16, 2009, the claimant was given a corrective action statement. The claimant was told to maintain the cleanliness of the store no matter how much time it took before he left for the day. He was also advised to check in on the weekends to see how operations were going and to work in the kitchen and get involved. The claimant was told this would be the last development plan and that if the store failed to maintain the standard of all Casey's store, "we will have not [sic] choice but to part ways." (Exhibit 6)

The claimant was on vacation from August 24, 2009, until August 31, 2009. This vacation had been approved by the employer. Maris Masengill, the area supervisor, came to the store in order to perform some of the claimant's job duties while he was gone. She discovered that the store was dirty. She spent the rest of the week cleaning the store. She also discovered that the claimant had failed to perform the daily cigarette audits on six days in August; four days in July; five days in June and three days in May. Based on the condition of the store and the failure to do the daily cigarette audits, the decision was made to terminate the claimant. The date of termination was August 31, 2009.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 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.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer or in repeated acts of carelessness or negligence. Mere inefficiency, unsatisfactory conduct or failure in good performance as the result of inability or incapacity is not misconduct within the meaning of the statute. The employer has the burden of proof on misconduct.

The evidence in this case established that the claimant's job performance was not satisfactory and that he did not meet the expectations of the employer in the management of his store. His

shortcomings were the subject of two different corrective actions, the most recent being in June 2009. The claimant was told that the June 2009 development plan was the "last plan." When Ms. Masengill came to the store on August 24, 2009, she described the store as a total mess and that she spent the rest of the week cleaning. She also found that the cigarette audits were not being done on a daily basis as required by Casey's policies.

The issue in this case is whether the claimant's failure of job performance was due to incapacity or inability or if he committed repeated acts of carelessness or negligence. After carefully considering the evidence in this case, the administrative law judge concludes that the claimant's conduct was due to carelessness or negligence. A critical piece of evidence in this case was the condition of the store when Ms. Masengill arrived on August 24, 2009, to do some of the claimant's work while he was on vacation. She found the condition of the store unacceptable and spent the rest of the week cleaning. The claimant testified that before he left on vacation, the store was clean and that its condition was due to the weekend crew. This explanation is not credible. A store that was clean on Friday would not be a "total mess" by Monday, even if the weekend crew had failed to do its job. The claimant was specifically asked if he had problems with the weekend crew not doing clean-up duties and he said no. The most reasonable conclusion based on the evidence is that the claimant deliberately chose not to follow through with instructions given by the employer on the store's condition. This is misconduct and benefits are denied.

The next issue is overpayment of benefits. Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

Since the claimant has received benefits on his current claim, the overpayment issue is remanded for determination to the Claims Division.

DECISION:

The decision of the representative dated September 18, 2009, reference 01, is reversed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible. The matter is remanded to the Claims Division for determination of the overpayment issue.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs