

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**LOUISE M SCHMELING**  
Claimant

**APPEAL NO. 17A-UI-11151-S1-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CASEY'S RETAIL COMPANY**  
Employer

**OC: 10/08/17**  
**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Louise Schmeling (claimant) appealed a representative's October 26, 2017, decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits after his separation from employment with Casey's Retail Company (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for November 16, 2017. The claimant was represented by Jim Hamilton, non-attorney representative, and participated personally. The employer was represented by Jackie Boudreaux, Hearings Representative, and participated by Zo Ann Ohlson, District Manager, and Jan Konrad, Regional Manager.

**ISSUE:**

The issue is whether the claimant was separated from employment for any disqualifying reason.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on July 13, 2011, and at the end of her employment she was working as a full-time area supervisor. The claimant signed for receipt of the employer's handbook on July 13, 2011. The employer updated their handbook after this date but the claimant did not sign for receipt of the updated version.

On November 27, 2013, the employer issued the claimant a written warning for using her cell phone and/or leaving safe keys unattended. On December 13, 2016, the employer issued the claimant a written warning for being in a picture on a co-worker's Facebook page where an employee had an open container in a parked company vehicle. The employer notified the claimant both times that further infractions could result in termination from employment.

On October 4, 2017, the claimant had a discussion about scheduling in her office. Some managers and an employee who had her arm in a sling attended the meeting. The claimant knew the employee's injury was work-related and she was working with restrictions. Before the meeting, another employee confided in the claimant about seeing the claimant use her arm outside of work. In the meeting the claimant asked the employee with the sling how she was

doing. She asked when she was returning to work without restrictions. The claimant asked if she was using her arm outside of work to pump fuel or carry her big purse. No other conversation occurred regarding the employee with the sling.

On October 5, 2017, the employee with the sling reported the interaction to the employer. The employer took statements from two employees. The employee with the sling said the claimant told her she “needed to get out of the immobilizer and get her ass back in the kitchen”. Another employee said the claimant asked the employee with the sling “when she was going to get her ass back in the kitchen”. The employer did not question the claimant. On October 10, 2017, the employer terminated the claimant for working outside her doctor’s orders and harassment of an employee.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual’s wage credits:

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 disqualification shall continue 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 employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. *Crosser v. Iowa Department of Public Safety*, 240 N.W.2d 682 (Iowa 1976). The employer had the power to present testimony but chose not to do so. It had collected statements from two of four witnesses. The statements do not carry as much weight as live testimony because the testimony is under oath and the witness can be questioned. The information submitted from the two statements is inconsistent. One witness indicates the claimant asked the employee when she was returning to work. The other witness states something different. The employer did not provide first-hand testimony at the hearing and, therefore, did not provide sufficient eye witness evidence of job-related misconduct to rebut the claimant's denial of said conduct. The employer did not meet its burden of proof to show misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

**DECISION:**

The representative's October 26, 2017, decision (reference 01) is reversed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

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Beth A. Scheetz  
Administrative Law Judge

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Decision Dated and Mailed

bas/rvs