

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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**JUDITH A MCCORD**

Claimant

**APPEAL 15A-UI-00876-LT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CASEY'S MARKETING COMPANY**

Employer

**OC: 01/04/15**

**Claimant: Appellant (2)**

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Iowa Code § 96.5(2)a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the January 16, 2015, (reference 01) unemployment insurance decision that denied benefits based upon a discharge from employment. The parties were properly notified about the hearing. A telephone hearing was held on February 13, 2015. Claimant participated and was represented by David Scott, Attorney at Law. Employer participated through store 2877 manager Harold Hughes. Employer's Exhibit 1 was received.

**ISSUE:**

Was the claimant discharged for disqualifying job-related misconduct?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a first assistant manager since April 2009, and was separated from employment on January 6, 2015, when she was discharged. On January 2 she completed a telephone transaction and activated 22 phone cards, which were paid for with a stolen credit card that had exceeded its limit before the \$950.00 transaction. The caller said her son's name is Jack Jones and asked for the manager and when claimant said he was not there, the caller explained that the first part of every month she purchases phone cards over the phone for her son so he can keep his phone activated and look for jobs. She told claimant her son was on his way to the store to pick up the cards and gave claimant a credit card number to enter. Then the caller asked claimant for the PIN numbers since her son loses the cards. Claimant thought she sounded convincing and was distracted by small-talk. Then the scammer called back and wanted to purchase more phone cards for her husband to get him through the month. Then it was for her four grandchildren. The combined transactions took over an hour. Afterwards claimant thought about it and realized her error and self-reported by calling supervisor Rob Wells. On January 3 she called Hughes and told him what she had done. The employer's informal written memos prohibit the purchase of and/or activating any cards (phone, gift, Visa, Green Dot, Black Hawk, etc.) over the phone. The most recent is dated September 26, 2012.

She initialed each of the memos. The memos do not indicate that a first violation will result in termination. (Employer's Exhibit 1) The cards must be activated in person by swiping the card through the Veriphone. Claimant admitted being "caught hook, line and sinker." She had been warned about taking a bad check for cash in June 2014.

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

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

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).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate

the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979). Where an individual is discharged due to a failure in job performance, proof of that individual's ability to do the job is required to justify disqualification, rather than accepting the employer's subjective view. To do so is to impermissibly shift the burden of proof to the claimant. *Kelly v. Iowa Dep't of Job Serv.*, 386 N.W.2d 552 (Iowa Ct. App. 1986).

A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy. Given the length of the transaction and claimant's distracted failure to comprehend she was being scammed, in combination with her self-report and apologies, the ALJ is convinced claimant earnestly did not act with any degree of deliberation, even though the conduct was certainly negligent. Although claimant was an assistant manager and signed each of the memos, she had never been warned about similar conduct. The check cashing procedure for which she was warned was not covered in the memos. If the employer put such emphasis on the memos as to result in termination upon first offense, reasonably the memos should have indicated such and been presented in some more formalized manner, including presentation more recently than 2012. Without such, and inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. No intentional misconduct has been established, as is the employer's burden of proof. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). Accordingly, no disqualification pursuant to Iowa Code § 96.5(2)a is imposed.

**DECISION:**

The January 16, 2015, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The benefits claimed and withheld shall be paid, provided she is otherwise eligible.

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Dévon M. Lewis  
Administrative Law Judge

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Decision Dated and Mailed

dml/pjs