

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MICHAEL L KERN
Claimant

APPEAL NO. 11A-UI-15888-S2

**ADMINISTRATIVE LAW JUDGE
DECISION**

**IOWA DEPARTMENT OF
TRANSPORTATION**
Employer

**OC: 11/13/11
Claimant: Appellant (1)**

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Michael Kern (claimant) appealed a representative's December 8, 2011 decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits because he was discharged from work with Iowa Department of Transportation (employer) for misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a hearing was scheduled for February 8, 2012, in Des Moines, Iowa. The claimant was represented by Peggy Phipps, and participated personally. Observing the hearing was Steven Hill, Brandi Hill, and Sean Passick. The employer was represented by David Williams, assistant manager of appellant services, and participated by Linda Anderson, executive officer II; Eric Lack, highway maintenance supervisor; and Ken Johnson, Kum & Go store manager. Observing the hearing was Janet Kout-Samson and Dana McKenna.

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 having considered all of the evidence in the record, finds that: The claimant was hired on March 30, 2001, as a full-time highway technician. The claimant signed for receipt of the work rules on March 30, 2001, and for the employer's handbook on September 30, 2011.

On October 19, 2011, the claimant, along with co-workers, stopped by a convenience store during the work day. Mr. Kern and his co-worker, Steven Hill, entered the store with nothing in their hands. Mr. Kern bumped a display of key chains, removed two from the display and put them in his side pocket. He proceeded to the corner of the store where he met Mr. Hill. A few minutes later, Mr. Hill entered the bathroom with a 100 ounce mug. Mr. Hill exited the bathroom without the mug. The two proceeded to the front of the store. Mr. Kern was attempting to hide a 63 ounce mug on his left side. Neither Mr. Hill nor Mr. Kern paid for any items. As they left the store, Mr. Kern told the convenience clerk that he just had a water refill.

After the two left the store, a third customer received a call on his cell phone as he was paying for his items. He went in the restroom and exited with a 100 ounce mug. He did not pay for the mug.

The convenience clerk had been watching the three. The clerk found the wrapping for one mug in the trash and the other wrapping hidden out of sight. He called law enforcement and they arrived shortly thereafter. The clerk and law enforcement viewed the video recording of the actions of the three. While law enforcement was present, Mr. Hill returned to the convenience store with money in his hand stating that his supervisor did not pay for items. Law enforcement handcuffed Mr. Hill and searched his pockets. A key chain in its original wrappings was found in Mr. Hill's pocket. Law enforcement also arrested Mr. Kern at the job site. A keychain was found on his person.

The two were immediately suspended pending investigation. Both admitted leaving the convenience store without paying for items. The employer terminated them on November 15, 2011.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for misconduct.

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.

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). The claimant clearly disregarded the standards of behavior that an employer has a right to expect of its employees. The claimant's actions were volitional. He intentionally took items for his own purposes during work hours from a convenience store. When a claimant intentionally disregards the standards of behavior that the employer has a right to expect of its employees, the claimant's actions are misconduct. The claimant was discharged for misconduct.

DECISION:

The representative's December 8, 2011 decision (reference 01) is affirmed. The claimant is not eligible to receive unemployment insurance benefits, because the claimant was discharged from work for misconduct. Benefits are withheld until the claimant has worked in and has been paid wages for insured work equal to ten times the claimant's weekly benefit amount, provided the claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/kjw