

IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI

DAVID A BOLLAND  
2302 – 23<sup>RD</sup> ST SW  
MASON CITY IA 50401

CASEYS MARKETING COMPANY  
C/o TALX UC EXPRESS  
PO BOX 283  
ST LOUIS MO 63166-0283

Appeal Number: 04A-UI-05047-HT  
OC: 04/04/04 R: 02  
Claimant: Respondent (2)

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4<sup>th</sup> Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a – Discharge  
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

The employer, Casey's Marketing Company (Casey's), filed an appeal from a decision dated April 22, 2004, reference 01. The decision allowed benefits to the claimant, David Bolland. After due notice was issued a hearing was held by telephone conference call on May 26, 2004. The claimant provided a telephone number of (641) 421-0856. That number was dialed at 1:00 p.m. and the only response was an answering machine. A message was left indicating the hearing would proceed without the claimant's participation unless he contacted the Appeals Section at the toll-free number prior to the close of the record. By the time the record was closed at 1:16 p.m. the claimant had not responded to the message and did not participate in the hearing. The employer participated by Store Manager Mitchell Varner.

## FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, the administrative law judge finds: David Bolland was employed by Casey's as an assistant manager at one of the stores in Mason City. He had been rehired after a prior period of employment which had ended in a discharge for inappropriate conduct while on duty. He was advised he was being given a "second chance" and any further inappropriate conduct would result in a second discharge.

On April 5, 2004, Store Manager Mitchell Varner received a note from the claimant that there had been a "run off" the day before. This is where a customer leaves without paying for gasoline. Mr. Varner watched the videotape from April 4, 2004, to determine if he could identify the non-paying customer. His review of the video tape showed the claimant allowing non-employees to run the cash register, go into the office, and be behind the counter. All of this is prohibited by the employer's policies, of which the claimant had received a copy. In addition, Mr. Bolland was observed engaging in a mock "sword fight" with another person, using store merchandise. He was also leaning on a freezer reading magazines and newspapers, which delayed his attention to customers coming into the store.

Mr. Varner contacted District Supervisor Chris Bills, who came to the store and viewed the videotape. The decision was made to discharge the claimant and he was summoned into the store and discharged.

David Bolland has received unemployment benefits since filing a claim with an effective date of April 4, 2004.

The record was closed at 1:16 p.m. At 1:34 p.m. the claimant called and requested to participate. He had received the notice of the hearing but at the time the hearing was scheduled, he was mowing the lawn and it "slipped his mind."

## REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant is disqualified. The judge concludes he is.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The claimant had been advised his job was in jeopardy as a result of his inappropriate conduct while on duty. Mr. Bolland violated company policy, and jeopardized the assets of the employer by allowing non-employees access to the office, the cash register, and the area behind the counter. He engaged in horseplay, which involved potential damage to store merchandise, and ignored customers. This is conduct not in the best interests of the employer and the claimant is disqualified.

Iowa Code Section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

The claimant has received unemployment benefits to which he is not entitled. These must be recovered in accordance with the provisions of Iowa law.

The next issue is whether the record should be reopened. The judge concludes it should not.

871 IAC 26.14(7) provides:

(7) If a party has not responded to a notice of telephone hearing by providing the appeals section with the names and telephone numbers of its witnesses by the scheduled time of the hearing, the presiding officer may proceed with the hearing.

- a. If an absent party responds to the hearing notice while the hearing is in progress, the presiding officer shall pause to admit the party, summarize the hearing to that point, administer the oath, and resume the hearing.
- b. If a party responds to the notice of hearing after the record has been closed and any party which has participated is no longer on the telephone line, the presiding officer shall not take the evidence of the late party. Instead, the presiding officer shall inquire as to why the party was late in responding to the notice of hearing. For good cause shown, the presiding officer shall reopen the record and cause further notice of hearing to be issued to all parties of record. The record shall not be reopened if the presiding officer does not find good cause for the party's late response to the notice of hearing.
- c. Failure to read or follow the instructions on the notice of hearing shall not constitute good cause for reopening the record.

The claimant received the notice of the hearing and knew the time and date it was scheduled. He responded to the notice but was not available at the number he provided. The reason for his non-participation was that it "slipped his mind" while he was mowing the lawn. If a party wishes to participate in a hearing, that party is obligated to make a good-faith effort to be available at the scheduled time. The claimant has not provided any good cause to reopen the record and the request is denied.

DECISION:

The representative's decision of April 22, 2004, reference 01, is reversed. David Bolland is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount, provided he is otherwise eligible. He is overpaid in the amount of \$1,391.00.

bgh/b