

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**BRIAN LONG**

Claimant

**APPEAL NO. 09A-UI-05483-S2T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CASEY'S MARKETING COMPANY**

Employer

**Original Claim: 03/01/09  
Claimant: Respondent (2-R)**

Section 96.5-2-a – Discharge for Misconduct

Section 96.3-7 – Overpayment

**STATEMENT OF THE CASE:**

Casey's Marketing Company (employer) appealed a representative's April 6, 2009 decision (reference 03) that concluded Brian Long (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for May 5, 2009. The claimant participated personally. The employer participated by Pam Marts, Manager.

**ISSUE:**

The issue is whether the claimant was discharged for misconduct.

**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 January 6, 2009, as a full-time pizza maker. The claimant called the employer on February 27, 2009. He told the employer that he did not feel well and had seen a doctor. The employer told the claimant that another employee had already called off the job and there was no one to work the claimant's shift. The claimant agreed to work.

The claimant appeared for work and talked to the employer. He did not mention his illness to her. The employer asked the claimant if he could come in the following day to discuss his employment. The claimant agreed to come in at 9:00 a.m. He understood he was scheduled to work from 6:00 to 10:00 p.m. After the employer left, the claimant wrote the employer a note stating he should not have to come in to work at a time that was not typed on the schedule. The claimant left the note for the employer.

On February 28, 2009, the employer arrived at work and found the claimant's note. When the claimant arrived for his 6:00 p.m. shift, he did not say anything to the employer about being sick. The employer asked to speak with the claimant in the back. She handed him some papers on a clipboard. The claimant refused to sign anything, threw the clipboard on a shelf and the papers landed at the employer's feet. The claimant told the employer she was being a bitch. He said

the words “fuck” and “bitch” repeatedly. His voice was loud enough that customers could hear him. The employer was frightened and asked him to leave the property. The claimant yelled things as he left the property and customers asked the employer if she were alright.

On March 6, 2009, the claimant gave the employer a doctor’s note signed on March 2, 2009, that stated the claimant could not work on February 27, 28, or 29, 2009 (sic). The employer was unaware that the claimant was restricted from working on February 27, and 28, 2009, until March 6, 2009.

## **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). Repeated failure to follow an employer’s instructions in the performance of duties is misconduct. Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employer has a right to expect employees to follow instructions in the performance of the job. The claimant disregarded the employer’s right by repeatedly failing to follow the employer’s instructions. He failed to arrive at the prearranged meeting time. He left a note rather than calling the employer. He used inappropriate language

and yelled at the employer. 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. 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.

The claimant's and the employer's testimony is inconsistent. The administrative law judge finds the employer's testimony to be more credible. The claimant's testimony did not make sense logically. The claimant did not explain why his physician would not provide him with a written restriction on February 27, 2009, why he would not abide by those restrictions, or bring those restrictions to the employer's attention. The employer cannot be held responsible for knowing something that it was not given notice of until after the termination.

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.

The claimant has received benefits since filing the claim herein. Pursuant to this decision, those benefits may now constitute an overpayment. The issue of the overpayment is remanded for determination.

**DECISION:**

The representative's April 6, 2009 decision (reference 03) is reversed. 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. The issue of the overpayment is remanded for determination.

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Beth A. Scheetz  
Administrative Law Judge

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Decision Dated and Mailed

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