IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

STACY L FORTENBERRY
Claimant

CASEY'S MARKETING COMPANY
Employer

APPEAL NO. 12A-UI-03640-HT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/04/12
Claimant: Appellant (2)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The claimant, Stacy Fortenberry, filed an appeal from a decision dated April 4, 2012, reference 02. The decision disqualified her from receiving unemployment benefits. After due notice was issued a hearing was held by telephone conference call on April 24, 2012. The claimant participated on her own behalf. The employer, Casey's, participated by Area Supervisor Tonya McKnickle.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Stacy Fortenberry was employed by Casey's from September 8, 2011 until March 7, 2012 as a full-time assistant manager. Store Manager Sandy Dunkin suspected theft because a purse which had been on the shelf was missing. She viewed the surveillance tapes for March 4, 2012, and saw the claimant take the purse. In addition, Ms. Fortenberry had taken some outdated items from the snack shelves such as granola bars, Rice Krispie Treats, beef jerky, and snack crackers.

It was perfectly legitimate for these items to be taken off the shelves if they were out of date. As a manager the claimant was also authorized to enter these items into the computer as "waste," which she did.

The employer asserted she took the items home with her for her own consumption. Ms. Fortenberry denied it and asserted she had thrown them in the garbage as required. In any event, the company policy is silent on this issue. Though policy prohibits taking items out of the store which have not been paid for, there is nothing about items which have been "wasted."

The purse had been returned by March 7, 2012, when the claimant was fired. On Saturday, March 3, 2012, she had instructed her daughter to go to Casey's and get some food for dinner and to pay for the purse which she wanted. When the daughter returned she said she had paid

for the purse but did not bring it home because it was raining. On March 4, 2012, the claimant took the purse home with her.

On Monday, March 5, 2012, when she and her daughter were more than an hour away from the store going to a doctor's appointment, Ms. Fortenberry learned the daughter had not, in fact, paid for the purse. On March 6, 2012, the claimant returned the purse to the store and the employer acknowledged it was there at the time of the discharge on March 7, 2012.

REASONING AND CONCLUSIONS OF LAW:

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 asserts the claimant confessed to taking the "wasted" food items home with her but the claimant denied this. Ms. McKnickle also admitted the claimant gave the same explanation about the erroneous belief the purse had been paid for at the time she was fired. The employer also acknowledged there is nothing specific in the company rules about what may or may not be done with "wasted" items.

The employer has the burden of proof to establish the claimant was discharged for substantial, job-related misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct

warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988).

There is enough agreement between the parties for the administrative law judge to determine the claimant had not been told of any rules, or indeed that any rules exist, about the taking of “wasted” items being grounds for discharge. The employer agrees the purse had been returned to the store before Ms. Fortenberry was fired. The taking of the purse was not deliberate theft but a good faith belief it had already been paid for and was returned when she learned it was not.

The record does not establish the claimant was guilty of substantial, willful and knowing misconduct. Disqualification may not be imposed.

DECISION:

The representative’s decision of April 4, 2012, reference 02, is reversed. Stacy Fortenberry is qualified for benefits, provided she is otherwise eligible.

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Bonny G. Hendricksmeyer
Administrative Law Judge

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Decision Dated and Mailed

bgh/pjs