BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

WILLIAM D JONES

Claimant

and

CASEY'S MARKETING COMPANY

Employer

HEARING NUMBER: 17BUI-04108

EMPLOYMENT APPEAL BOARD DECISION

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-2A

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The Claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The Claimant, William D. Jones, worked for Casey Marketing Co. from June 10, 2015 through March 20, 2017 as a full-time store employee whose primary duties were being a cashier, watching gas pumps, and cleaning. (5:16-6:21; 25:55-26:15) The Employer has a written gas drive off policy. That policy includes a directive: “Call your local police department ONLY IF: Employee has a complete license plate number…[*inter alia*].” It also provides that “[s]tore employees must watch the pumps and collect for all gasoline sales.” If the policy is violated, the employee may receive a corrective action, up to and including discharge. (Exhibit 1) Its progressive discipline section sets forth prior to termination: 1) verbal warning; 2) written warning; 3) suspension without pay (1-5 days) and 4) then discharge. Mr. Jones signed in acknowledgement of receipt at the start of his employment. (Exhibit 1-unnumbered p. 2)

The Employer also has an unwritten policy that requires cashiers to ask each customer if they've purchased gas before ringing them up. (9:27-10:28; 35:30-35:42) Ms. Karr did not know if the Claimant was originally trained on this procedure at the time of his hire. (29:30-29:33; 35:00-35:12) It only became known to him when the Employer verbally informed him of it after he received his first written warning on January 26, 2016 for having a gas drive-off. (29:38-30:00; 35:30-35:41) Mr. Jones received several other written warnings (10-29-15, 1-26-16, 4-24-16, 5-1-16 and 7-18-16) for having additional gas drive-offs during his shifts. He was never suspended as a result of these drive-offs.

On March 18, 2017, Mr. Jones was the only person on the cash register and was busy with customers when an unknown customer pulled up, pumped gas and drove off. (27:11-27:21; 39:47-40:00) This came to his attention a few minutes after it happened when the cash register repeatedly 'dinged' to alert him that gas was pumped and not paid for. (30:50-31:02) It was unclear whether this same customer came into the store to purchase other items because there are no cameras outside to record it. (27:22-28:09; 42:02-42:33) The only cameras available are inside the store, which provide low visibility of the outside perimeter. (28:04-28:13) Mr. Jones thought the vehicle that drove off was a white truck with a trailer attached, but was unable to view the license plate. (28:37-29:09) He couldn't say with certainty whether he asked this customer if he purchased gas because he wasn't sure this customer actually came into the store. (30:07-30:23) He didn't call the police because he had no license plate number to relay as required by the policy. (32:55-33:06, Exhibit 1)

Mr. Jones immediately contacted Ms. Karr (as required by policy) to inform her of the incident and was told she would deal with the matter when she came in on March 20th, 2016. (11:20-11:27; 31:17-31:28) When they met on the 20th, they watched the surveillance video, but the Claimant was unable to affirmatively identify the customer. (40:56-41:19) He was subsequently discharged.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2013) provides:

> *Discharge for Misconduct*. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:
>
> The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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 Iowa Supreme court has accepted this definition as reflecting the intent of the legislature. *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 665, (Iowa 2000) (quoting *Reigelsberger v. Employment Appeal Board*, 500 N.W.2d 64, 66 (Iowa 1993).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 NW2d 661 (Iowa 2000).

The Claimant provided credible testimony as to the course of events that led to his being unable to affirmatively identify whether or not the customer seen on the video was the same customer he believed was the one who drove off without paying for gas on March 18, 2016. He indicated that it was a busy night and he was alone on the register. It is not wholly unfathomable for a customer to slip past him without paying given the circumstances. What is clear is that he followed protocol by contacting his superior rather than calling the police because he would not have been able to provide the police with a license plate number. Although he equivocates as to whether he asked the customer if he purchased gas, the Claimant was admittedly unclear if the drive-off customer ever came into the store. So how could he positively know whether he asked this particular customer that question? Even though the Employer argues that the video shows the drive-off customer came into the store, it doesn't prove Mr. Jones was untruthful, or that he intentionally didn't ask him if he purchased gas. The Employer's policy is a difficult one to follow; even if it were proven the Claimant asked the customer if he purchased gas, what's to stop that customer from lying and then driving off, if that was his intention in the first place? How then would the Claimant be able to quickly catch the license plate number once his guard was let down when the customer lied, and drove off? He would have to rely on the 'ding' mechanism to alert him, which would have placed him in the same predicament Mr. Jones found himself on the night of March 18th. Based on this record, we can see no wrongdoing on the part of the Claimant. He handled the situation to the best of his ability that evening.

Lastly, the Employer failed to follow its own policy with regard to its progressive disciplinary policy. It would seem that the Claimant would have been subject to a disciplinary suspension at this point given his past written warnings, rather than termination. In viewing this record as a whole, we conclude the Employer failed to satisfy their burden of proof.

DECISION:

The administrative law judge's decision dated May 9, 2017 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for no disqualifying reasons. Accordingly, he is allowed benefits provided he is otherwise eligible.

The Claimant submitted additional evidence to the Board which was not contained in the administrative file and which was not submitted to the administrative law judge. While the additional evidence was reviewed for the purposes of determining whether admission of the evidence was warranted despite it not being presented at hearing, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today's decision. There is no sufficient cause why the new and additional information submitted by the Claimant was not presented at hearing. Accordingly all the new and additional information submitted has not been relied upon in making our decision, and has received no weight whatsoever, but rather has been wholly disregarded.

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Kim D. Schmett

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Ashley R. Koopmans

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James M. Strohman

AMG/fnv