

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**GEORGE R BUMGARDNER**  
Claimant

**APPEAL NO: 10A-UI-02021-DT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CASEY'S MARKETING COMPANY**  
Employer

**OC: 01/03/10**

**Claimant: Respondent (2/R)**

Section 96.5-2-a – Discharge  
Section 96.3-7 – Recovery of Overpayment of Benefits

**STATEMENT OF THE CASE:**

Casey's Marketing Company (employer) appealed a representative's January 27, 2010 decision (reference 01) that concluded George R. Bumgardner (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 12, 2010. The claimant had responded to an earlier hearing notice by calling the Appeals Section and providing a telephone number at which he could be reached for the hearing. The previously scheduled hearing was rescheduled twice at the claimant's request. On April 9, he recontacted the Appeals Section to confirm that he would participate in the April 12 hearing and to provide information regarding a witness he intended to have participate with him in the hearing. However, when the administrative law judge called the claimant at the number he had previously provided at the scheduled time for the hearing, he was not available; therefore, the claimant did not participate in the hearing. Bo Knop appeared on the employer's behalf and presented testimony from one other witness, Connie Smith. Based on the evidence, the arguments of the employer, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUE:**

Was the claimant discharged for work-connected misconduct?

**FINDINGS OF FACT:**

The claimant started working for the employer on April 9, 2009. He worked part time (about 25 – 30 hours per week) as a cashier and pizza cook at the employer's Bondurant, Iowa store, primarily working evening shifts. His last day of work was November 27, 2009. The employer discharged him on that date. The stated reason for the discharge was turning off the ringer on the phone in the pizza kitchen, preventing customers from being able to place orders.

November 27 was the Friday after Thanksgiving; that evening would typically be a very busy time for pizza orders. At around 8:00 p.m. the area supervisor, Mr. Knop, received a call from the other store operated by the employer in Bondurant, indicating that they had received at least

three calls from customers wishing to order pizzas who reported that they had attempted to call the store at which the claimant was working, but the phone was not answered. From his cell phone, Mr. Knop immediately proceeded to call the phone in the pizza kitchen in that store, but the phone was not answered after regardless of how long he allowed the phone to ring. He then contacted Ms. Smith, the manager of that store, and headed to the store. He continued to attempt to call the pizza kitchen as he was en route. Upon arriving at the store at about 8:20 p.m., he again dialed the pizza kitchen's phone as he walked in, so it should have been ringing as he entered the store. However, the pizza kitchen's phone was silent, and the claimant was standing around talking with another employee whose shift had gotten done at 8:00 p.m.

When questioned about the phone, the claimant indicated that the phone must have been malfunctioning. Upon examination, the switch on the phone had been manually moved to the silent setting. The claimant suggested that the switch must have been switched off accidentally. However, there had been a prior similar incident involving the claimant a month or two prior to this incident, and as a result Ms. Smith had modified the switch on the phone so that it required a substantial and conscious effort to move the switch. Upon viewing video surveillance, the employer observed the claimant doing something with the phone mechanism at approximately 7:40 p.m. The employer concluded the claimant had intentionally switched off the ringer to the phone to avoid having to take pizza orders and having to work. As a result, the employer discharged the claimant.

The claimant established a claim for unemployment insurance benefits effective January 3, 2010. The claimant has received unemployment insurance benefits after the separation.

#### **REASONING AND CONCLUSIONS OF LAW:**

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982); Iowa Code § 96.5-2-a.

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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. 871 IAC 24.32(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The claimant's intentional sabotage to the employer's revenue by preventing customers from being able to place orders shows a willful or wanton disregard of the standard of behavior the

employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. The employer discharged the claimant for reasons amounting to work-connected misconduct.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code § 96.3-7. In this case, the claimant has received benefits but was ineligible for those benefits. The matter of determining the amount of the overpayment and whether the claimant is eligible for a waiver of overpayment under Iowa Code § 96.3-7-b is remanded the Claims Section.

**DECISION:**

The representative's January 27, 2010 decision (reference 01) is reversed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of November 27, 2009. This disqualification continues until the claimant has been paid ten times his weekly benefit amount for insured work, provided he is otherwise eligible. The employer's account will not be charged. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue and whether the claimant is eligible for a waiver of any overpayment.

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Lynette A. F. Donner  
Administrative Law Judge

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Decision Dated and Mailed

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