

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SUSAN BISHOP

Claimant

APPEAL NO. 09A-UI-18177-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING COMPANY

Employer

**Original Claim: 10/04/09
Claimant: Respondent (2/R)**

Iowa Code § 96.5(2)(a) - Discharge for Misconduct

Iowa Code § 96.3-7 - Overpayment

STATEMENT OF THE CASE:

Casey's Marketing Company (employer) appealed an unemployment insurance decision dated November 24, 2009, reference 01, which held that Susan Bishop (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on January 13, 2010. The claimant participated in the hearing. The employer participated through Michelle Walker, Manager, and Karen Colvin, Area Supervisor. Employer's Exhibits One through Three were admitted into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

The issue is whether the employer discharged the claimant for work-related 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 employed as a part-time cashier from May 12, 2009 through September 24, 2009. She was discharged for failure to follow policy on September 21, 2009; she failed to secure a customer's wallet that was mistakenly left on the counter and given to her and its contents were stolen. A co-worker was in the store on September 21, 2009 to pick up a pizza. The co-worker saw a wallet sitting on the counter and handed it over to the claimant, who was working at the cash register. The claimant opened the wallet and her co-worker saw there was cash in the wallet. The claimant testified at the hearing that she did not observe the cash in the wallet because she was only looking at the identification card. She placed the wallet next to the cash register. The employer has a surveillance camera on the wall behind the front counter and it focuses on the cash register. The camera can only see the back of the employee working at the cash register.

The claimant subsequently placed her purse on top of the counter next to the cash register and left it there. She testified she needed it there because she was trying to quit smoking and needed stuff out of her purse. The claimant took out her own wallet and set it on the counter.

The employer testified there are compartments right below the cash register where the employees' purses are usually kept and the claimant regularly kept her purse below the cash register. The claimant's boyfriend came into the store, the claimant grabbed her purse and went outside with her boyfriend. After she left the front counter, the wallet was missing and no longer next to the cash register. The claimant subsequently returned from outside, went directly to the supervisor's desk, and placed the wallet on the manager's desk along with a note explaining it had been left on the counter. There is another surveillance camera showing all activity in the manager's office.

The manager reported to work on the following morning and found the wallet and note on her desk. Shortly thereafter, the customer who had lost his wallet contacted the employer to ask about it. The manager advised it had been turned in and the customer wanted to know if the cash was still in it; he said he had approximately \$400.00 in his wallet. The manager advised him there was nothing in it except for his identification card. The customer contacted the police and reported the theft. The police questioned the employer about the incident and reviewed the employer's surveillance tapes. The police subsequently arrested the claimant for fourth degree theft and the criminal case is currently pending.

The claimant filed a claim for unemployment insurance benefits effective October 4, 2009 and has received benefits after the separation from employment.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. 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.

Iowa Code § 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 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 claimant was discharged on September 24, 2009 for theft of cash from a customer's wallet that was found and given to her. She denies taking the money but cannot offer a plausible explanation as to where the money went. The employer's surveillance tapes show she was the only individual who handled the wallet. The co-worker that turned it in saw the claimant open it and saw money in the wallet. The claimant's contention that she did not see any money because she was looking at the identification card is simply not credible. Additionally, her explanation as to why she had her purse on the front counter near the cash register also lacks credibility.

The Waverly police found sufficient evidence to charge the claimant with theft in the fourth degree for taking the cash from the customer's wallet. The standard of proof in unemployment insurance hearings is not nearly as high and the preponderance of the evidence in this case confirms the claimant stole the cash out of the customer's wallet. The claimant's theft 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. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

Iowa Code § 96.3(7) 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. The overpayment recovery law was updated in 2008. See Iowa Code § 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The unemployment insurance decision dated November 24, 2009, reference 01, is reversed. The claimant is not eligible to receive unemployment insurance benefits, because she was discharged from work for misconduct. Benefits are withheld until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/kjw