

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DEBBIE BAUMEISTER
Claimant

APPEAL NO: 10A-EUCU-00028-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING COMPANY
Employer

OC: 11/09/08
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 December 31, 2009, reference 02, which held that Debbie Baumeister (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 February 18, 2010. The claimant participated in the hearing. The employer participated through Robert Cooper, Store Manager. 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 considered all of the evidence in the record, finds that: The claimant was employed as a full-time store employee from June 8, 2009 through September 3, 2009. She violated company policy and state law on August 31, 2009 when she sold tobacco products to a minor during a police sting. Employees are not allowed to sell tobacco products to a minor and employees have three different procedures to check the birth dates of the customer. Employees have to take some type of affirmative action before the purchase of tobacco products will be allowed by the cash register.

On each day, the cash register/computer shows the date by which a person must have been born on or before, in order to legally purchase tobacco products. The dates change daily and when a customer, who is clearly not a minor, seeks to purchase a tobacco product, the employee is supposed to put the day before the date showing on the computer. When a customer's age is questionable, the clerk must request to see a driver's license. Once the driver's license is obtained, the clerk types in the customer's birth date in the computer screen. If the customer is legally able to purchase tobacco products, the cash register will go forward with the transaction. If the customer is not legally able to purchase tobacco products, the cash register will state that it is a restricted sale and the tobacco products cannot be purchased.

The clerk can also use the hand-held laser scanner to verify a person's age but sometimes this second step does not work properly and the clerk has to use the first method of verifying a person's age, by entering the customer's birth date in the cash register. However, the clerk can also use a third method of verifying a customer's age by punching in the birth date on the Hypercom machine.

A young woman sought to purchase Marlboro cigarettes on August 31, 2009. The claimant took her driver's license and entered "112233" for the customer's birth date. The minor should not have been allowed to purchase the tobacco products and if the claimant had followed standard procedures, the computer would not have allowed the sale to go through. A police officer was in line at the same time and pulled the claimant to the side to advise her she had just sold tobacco products to a minor. Typically the clerk receives a misdemeanor ticket but the claimant did not receive a ticket that day. The assistant manager sent the claimant home after that. The manager was out of town at that time but when he returned, he watched the surveillance video and reviewed the receipt, which is how he knew the claimant entered the fraudulent numbers on the cash register. The claimant was discharged on September 3, 2009.

The claimant filed a claim for unemployment insurance benefits effective November 9, 2008 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 3, 2009 for illegally selling tobacco products to a minor on August 31, 2009. Her actions were not accidental since she intentionally entered false information into the cash register to proceed with the transaction. These were two separate and intentional acts: she obtained the driver's license and either did not read the birth date or chose to disregard it and then she entered fraudulent information in the computer to allow the purchase to go through. The claimant contends she did not receive proper training and was told to put the fraudulent numbers in the computer but her explanation is not credible or reasonable. The whole purpose of using the three methods to check birth dates is to provide a failsafe method to prevent selling tobacco products to a minor, since the violation could affect both the employee and the employer. The claimant's conduct 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 December 31, 2009, reference 02, 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/pjs