

**IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI**

**NICKY L MORTENSON  
1205 E PLATT #116  
MAQUOKETA IA 52060**

**CASEY'S MARKETING COMPANY  
CASEY'S GENERAL STORE  
c/o TALX UCM SERVICES  
PO BOX 283  
ST LOUIS MO 63166-0283**

**Appeal Number: 05A-UI-8702-H2T  
OC: 04-03-05 R: 04  
Claimant: Respondent (2)**

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a – Discharge/Misconduct  
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the August 15, 2005, reference 03, decision that allowed benefits. After due notice was issued, a hearing was held on September 8, 2005. The claimant did not participate. The employer did participate through Mary Hanrahan, Supervisor. Employer's Exhibit One was received.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a cashier/cook full time beginning December 15, 2004 through July 18, 2005, when he was discharged. The claimant was discharged for his failure to perform his required duties in a timely and efficient manner.

The claimant called after the hearing record had been closed and had not followed the hearing notice instructions pursuant to 871 IAC 26.14(7)a-c. The claimant received the hearing notice prior to the September 8, 2005 hearing. The instructions inform the parties that if the party does not contact the Appeals Section and provide the phone number at which the party can be contacted for the hearing, the party will not be called for the hearing. The claimant provided a number where he could be reached at for the hearing but was not available at the number when the administrative law judge called to begin the hearing. The claimant called after the record had been closed and indicated that he had gone to work and mistakenly believed that the hearing started at 1:30 p.m. The claimant misread the hearing notice or forgot about the hearing and went to work. The claimant did not request a continuance of the hearing time to accommodate his new work schedule.

On July 17, 2005, while he was at work, the claimant spent time working on his own and a friend's car in the parking lot. The claimant's wife came into the store and got into an intense argument with the claimant where both were using profanity in front of customers and coworkers.

On January 13, the claimant was disciplined for failing to do gas pump reading, failing to drop the money in the safe. Additionally, the claimant called in ten minutes prior to the start of his shift on June 19, which was Father's Day, and indicated that he would not be into work for his shift because he had decided to spend the day with his children. The schedule had been posted for almost three weeks and the claimant did not seek time off prior to ten minutes before the beginning of his shift. The employer had to scramble to cover the claimant's shift with ten minutes' warning all because the claimant decided he did not want to work. On July 14, the claimant was working the lunch shift and failed to make any pizzas for the lunch rush, costing the employer potential lunch sales. The claimant also repeatedly failed to complete his prep work so that the person who followed his shift was left to complete the claimant's work and his or her own. The claimant repeatedly left the condiment tray out overnight resulting in spoilage that had to be thrown away. The claimant had previously performed his job duties in an acceptable manner demonstrating that he did in fact know how to properly perform all functions of the job. The claimant did not perform his job functions when he did not want to. His failure to perform his job functions resulted in lost sales for the employer and additional work for other employees.

The claimant has claimed and received unemployment insurance benefits after the separation from employment.

#### REASONING AND CONCLUSIONS OF LAW:

The first issue in this case is whether the claimant's request to reopen the hearing should be granted or denied.

871 IAC 26.14(7) provides:

(7) If a party has not responded to a notice of telephone hearing by providing the appeals section with the names and telephone numbers of its witnesses by the scheduled time of the hearing, the presiding officer may proceed with the hearing.

a. If an absent party responds to the hearing notice while the hearing is in progress, the presiding officer shall pause to admit the party, summarize the hearing to that point, administer the oath, and resume the hearing.

- b. If a party responds to the notice of hearing after the record has been closed and any party which has participated is no longer on the telephone line, the presiding officer shall not take the evidence of the late party. Instead, the presiding officer shall inquire as to why the party was late in responding to the notice of hearing. For good cause shown, the presiding officer shall reopen the record and cause further notice of hearing to be issued to all parties of record. The record shall not be reopened if the presiding officer does not find good cause for the party's late response to the notice of hearing.
- c. Failure to read or follow the instructions on the notice of hearing shall not constitute good cause for reopening the record.

The claimant called the Appeals Section for the September 8, 2005 hearing was after the hearing had been closed. Although the claimant may have intended to participate in the hearing, the claimant failed to read or follow the hearing notice instructions and was not available for the hearing when the administrative law judge called to begin the hearing. The rule specifically states that failure to read or follow the instructions on the hearing notice does not constitute good cause to reopen the hearing. The claimant forgetting about the hearing or misreading the hearing instructions is not good cause to reopen the record. The claimant did not establish good cause to reopen the hearing. Therefore, the claimant's request to reopen the hearing is denied.

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The claimant had demonstrated the ability to properly perform all the functions of his job properly and in accordance with the employer's specifications and instructions. The claimant's failure to properly perform his job functions was a choice he made, because he clearly knew how to perform the functions correctly. The employer's evidence does establish that the claimant deliberately and intentionally acted in a manner he knew to be contrary to the employer's interests or standards. There was a wanton or willful disregard of the employer's standards. In short, substantial misconduct has been established by the evidence. The claimant's actions constitutes disqualifying misconduct. Benefits are denied.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

#### DECISION:

The August 15, 2005, reference 03, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant is overpaid benefits in the amount of \$219.00.

tkh/kjw