

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

VICTOR PROBST

Claimant

APPEAL NO. 09A-UI-04631-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING COMPANY

Employer

**Original Claim: 02/22/09
Claimant: Respondent (2-R)**

Section 96.5-2-a – Discharge for Misconduct

Section 96.3-7 – Benefit Overpayment

STATEMENT OF THE CASE:

Casey's Marketing Company (employer) filed an appeal from a representative's decision dated March 13, 2009, reference 01, which held Victor Probst (claimant) eligible to receive unemployment insurance benefits. After due notice was issued, a telephone conference hearing was scheduled for and held on April 21, 2009. The claimant participated personally. The employer participated by Ms. Robin Trimble, store manager.

ISSUE:

At issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered the evidence in the record, finds: The claimant was employed by Casey's Marketing Company from January 2008 until February 11, 2009, when he was discharged for failure to report for scheduled work for two consecutive days without providing notification. Mr. Probst was employed as a full-time cashier and was paid by the hour. His immediate supervisor was Robin Trimble.

The claimant was discharged on February 11, 2009, after he failed to report for scheduled work on February 9 and February 10, 2009, and did not provide any notification of his impending absence to the employer. Mr. Probst had been arrested and required to serve two days in jail due to a prior conviction. While incarcerated, the claimant made no arrangements to have anyone contact his employer to report his impending absences. Under company policy, employees are subject to discharge if they fail to report or provide notification for two days. The claimant was aware of the company policy.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes that the claimant was discharged for misconduct sufficient to deny unemployment insurance benefits. It does.

The evidence in the record establishes the claimant was discharged when he failed to report for scheduled work and provided no notification to the employer for two consecutive workdays in violation of a known company policy. The claimant was incarcerated and required to serve a two-day jail sentence based upon a previous conviction. The claimant made no arrangements to have anyone else provide notification to the employer of his impending absences. The claimant was aware that failure to report or provide notification on two occasions could result in his termination from employment.

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.

For the reasons stated herein, the administrative law judge concludes the claimant was discharged under disqualifying conditions when he violated a known company policy by failing to provide notification to the employer on two or more consecutive workdays. The claimant was incarcerated based upon personal conduct that had resulted in his being convicted of a crime. The administrative law judge concludes the employer has sustained its burden of proof in showing the claimant was discharged under disqualifying conditions. Benefits are withheld.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

The issue of whether the claimant must repay the unemployment benefits is remanded to the Unemployment Insurance Services Division for determination.

DECISION:

The representative's decision dated March 13, 2009, reference 01, is reversed. Victor Probst is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount, provided he is otherwise eligible. The issue of whether the claimant must repay the unemployment benefits is remanded to the Unemployment Insurance Services Division for determination.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

kjw/kjw