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

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CASEY'S MARKETING COMPANY
D/B/A/ CASEY'S GENERAL STORE
C/O TALX UCM SERVICES INC
ST LOUIS MO 63166-0283

Appeal Number: 04A-UI-01313-RT
OC: 01-04-04 R: 04
Claimant: Respondent (1)

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.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-2(a) – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Casey's Marketing Company, doing business as Casey's General Store, filed a timely appeal from an unemployment insurance decision dated January 30, 2004, reference 01, allowing unemployment insurance benefits to the claimant. After due notice was issued, a telephone hearing was held on February 27, 2004, with the claimant participating. The employer did not participate in the hearing. Although the employer had called in a telephone number where a witness, Mary Hanrahan, purportedly could be reached for the hearing, when the administrative law judge called that number at 9:00 a.m. Ms. Hanrahan was not there. It was a telephone number for the employer. Apparently, Ms. Hanrahan was at another store, but the person with whom the administrative law judge spoke could not provide another telephone

number with which to reach Ms. Hanrahan. The administrative law judge left a message with the person who answered the phone that he was going to proceed with the hearing and if the employer wanted to participate, the employer needed to call before the hearing was over and the record was closed. The administrative law judge provided an 800 number for the employer to use. The employer is represented by TALX UCM Services, Inc., which is well aware of the need to call in a telephone number in advance of the hearing and then have witnesses available at that number at the time and date set for the hearing. This did not occur. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

The employer's witness, Mary Hanrahan, called the administrative law judge at 9:21 a.m., after the hearing had been closed. The hearing began when the record was opened at 9:04 a.m. and ended when the record was closed at 9:12 a.m., and no one had called during that period of time. Ms. Hanrahan informed the administrative law judge that she believed the hearing was the previous Friday and that it was her fault that she was not at the number previously provided. Ms. Hanrahan again stated that it was definitely her fault for not being available for the hearing, but that she had been busy. The administrative law judge believes that 871 IAC 26.14(7)(b) is relevant here, even though that speaks to a situation in which a party does not provide a telephone number. That rule states that for good cause shown, the administrative law judge shall reopen the record and cause further notice of hearing to be issued to all parties of record but, the record shall not be reopened if the administrative law judge does not find good cause for doing so. The administrative law judge concludes here that the employer has failed to demonstrate good cause for reopening the record and rescheduling the hearing. Ms. Hanrahan credibly conceded that she thought the hearing was the previous Friday and it was her fault that she did not participate in the hearing. The administrative law judge does not believe that this is good cause for reopening the record and rescheduling the hearing. If Ms. Hanrahan thought the hearing was last Friday, and obviously no hearing occurred last Friday, then she should have checked to verify when the hearing was and she would have learned that it was this Friday. In any event, the administrative law judge concludes that the employer has not demonstrated good cause to reopen the record and reschedule the hearing. The administrative law judge informed Ms. Hanrahan that he would treat her telephone call made after the hearing was over as a request to reopen the record and reschedule the hearing. The administrative law judge hereby denies that request because the employer has not demonstrated good cause for doing so.

FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a part-time morning cook from April 6, 2003 until she was discharged on December 25, 2003. The claimant averaged between 15 and 25 hours per week. The claimant was discharged by a new supervisor, Carlotta Bartlet. When discharged the claimant was informed that she was discharged because she was not doing things properly in terms of her cooking. However, the claimant was trying to follow proper procedures and believed that she was doing so properly. At the time of her discharge she was training another person and there was no supervisor present. When the supervisor arrived, she discharged the claimant. The claimant had received no warnings or disciplines for any similar or such behavior. The claimant truly believed that she was following the employer's procedures properly and she was working to the best of her ability. Pursuant to her claim for unemployment insurance benefits filed effective January 4, 2004, the claimant has received unemployment insurance benefits in the amount of $617.00 as follows: $92.00 per week for six weeks, from benefit week ending January 10, 2004 to benefit week

ending February 14, 2004, and $65.00 for benefit week ending February 21, 2004 (earnings $50.00).

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.

2. Whether the claimant is overpaid unemployment insurance benefit. She is not.

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).

In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code Section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its

progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer failed to participate in the hearing and provide sufficient evidence of deliberate acts or omissions on the part of the claimant constituting a material breach of her duties and/or evincing a willful or wanton disregard of an employer's interest and/or in carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. The administrative law judge notes that in the employer's appeal filed by its representative the only reason given for the claimant's denial of benefits is that she was "discharged." The claimant credibly testified that she was discharged by a new supervisor for not following the employer's rules properly when cooking. However, the claimant testified credibly that she was trying to follow the rules properly and was doing so, or believed that she was doing so. At the time of her discharge she was training another cook and no supervisor was there. When the supervisor arrived, she discharged the claimant. The claimant had received no warnings or disciplines for this or similar behavior. The claimant believed that she was following the employer's policies correctly and properly and she was working to the best of her ability. Accordingly, the administrative law judge concludes that there is not a preponderance of the evidence that the claimant committed any deliberate act or omission constituting material breach of her duties and obligations arising out of her worker's contract of employment or evincing a willful or wanton disregard of an employer's interest or in carelessness or negligence in such a degree of recurrence, any of which would establish disqualifying misconduct. At the very most, the evidence here indicates that the claimant was discharged for mere inefficiency or unsatisfactory conduct or failure in good performance, and this is not disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct, and, as a consequence, she is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa app. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant her disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided she is otherwise eligible.

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.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of $617.00 since separating from the employer herein on or about December 25, 2003, and filing for such benefits effective January 4, 2004. The

administrative law judge further concludes that that claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of January 30, 2004, reference 01, is affirmed. The claimant, Emily M. Vorwald, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible. As a result of this decision the claimant is not overpaid any unemployment insurance benefits arising out of her separation from the employer herein.

dj/b