IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

BILL S OGLESBY Claimant **CASEY'S MARKETING COMPANY** Employer	**APPEAL 15A-UI-08389-SC-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 06/28/15** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the July 16, 2015, (reference 01) unemployment insurance decision that denied benefits based upon the determination he was discharged for violating a known company rule. The parties were properly notified about the hearing. A telephone hearing was held on August 18, 2015. Claimant Bill Oglesby participated on his own behalf. Employees Roxanne Hendrick and Beth Bolenous also participated on the claimant's behalf. Employer Casey's Marketing Company participated through Area Supervisor Deb Waage. Employer's Exhibits 1 through 3 were received..

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was most recently employed part-time as an associate in the kitchen beginning October 23, 2014, and was separated from employment on May 26, 2015, when he was discharged. The claimant had previously worked for the employer at different times beginning in September 2002. He reported directly to the Kitchen Manager Corrine Chapney and ultimately to General Manager Crystal Running.

The employer has a policy regarding the removal of company property which states company property is not to be removed from the store without manager approval. (Employer's Exhibit 3). The claimant signed he had read and would comply with the policy on his most recent date of hire. The claimant was terminated for unauthorized removal of company property. On May 25, 2015, Area Supervisor Deb Waage was asked by Running to review the surveillance footage from May 16, 2015. Waage did and observed the claimant removing a newspaper from the newsstand and eventually leaving the store without paying for it. She also observed him pick up an ice cream cone, place it on the counter, and purchase lottery tickets before leaving for the day. (Employer's Exhibit 1). She determined that the claimant did not pay for the ice cream cone as it was not included as part of the sale.

The claimant had not received any prior warnings for the same or similar conduct. The claimant had been told by previous managers, including the one who rehired him and was replaced by Running, that it was acceptable to read the newspaper without paying for it. Other employees would regularly read the newspaper from the newsstand without paying for it and would eat food without paying for it. Additionally, Chapney stepped down from her position as she had been asked to discipline only some individuals for the unauthorized eating of food without payment.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

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.

Iowa Admin. Code r. 871-24.32(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.
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> 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 Dep't of Job Serv.,* 275 N.W.2d 445, 448 (Iowa 1979).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. The issue is not whether the employer made a correct decision in separating the claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

The claimant has credibly established he did not have the required intent to make this disqualifying job-related misconduct. He was told by former managers that people were allowed to read a newspaper from the newsstand. His witnesses established that other employees would engage in the same conduct. While the claimant should have recognized he had not been charged for the ice cream based on his knowledge of the cost of the ice cream cone and the cost of lottery tickets, it is believable he and the cashier were careless when ringing up his purchases, but no wrongful intent has been shown because he placed the ice cream cone on the counter, as would any customer, and he did not try to conceal the item. His witnesses also established other employees would regularly eat food without paying for it.

The conduct for which the claimant was discharged was indicative of poor judgment; however, there was conflicting directions given by his supervisors with regard to the policy and inasmuch as the employer had not previously warned the claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning. Additionally, others involved in the same or similar conduct were not disciplined, thus the claimant seems to have been the subject of disparate application of the policy, which cannot support a disqualification from benefits.

DECISION:

The July 16, 2015, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Stephanie R. Callahan
Administrative Law Judge

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Decision Dated and Mailed

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