

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RACHELLE GANGESTAD

Claimant

APPEAL NO: 10A-UI-13420-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING COMPANY

Employer

OC: 08/29/10

Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Rachelle Gangestad (claimant) appealed an unemployment insurance decision dated September 24, 2010, reference 01, which held that she was not eligible for unemployment insurance benefits because she was discharged from Casey's Marketing Company (employer) for work-related misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on December 6, 2010. The claimant participated in the hearing. The employer participated through Manager Darla Fredrichsen. Employer's Exhibits One and Two were admitted into evidence. 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 part-time kitchen worker from August 27, 2009 through August 27, 2010. She was discharged for theft after the manager saw on surveillance the claimant take out a pizza without paying for it on August 23, 2010. The manager was reviewing surveillance tapes since she had a problem with her kitchen staff not wearing their smocks, aprons, and visors. It had been really hot and the manager saw that the kitchen staff let the freezer door remain open for almost an hour in order to cool down the kitchen. The employer had also been having problems with water on the kitchen floor so the manager started paying close attention to the surveillance tape when she saw the freezer door open.

The claimant made a pepperoni pizza on August 23, 2010 and after it was cooked, she boxed it and put it on top of the oven. It was near the time for her to clock out so she then put the pizza box on the counter, put several recycling boxes on top of it, and left the store without paying for it. The claimant dropped off the recycling boxes once she was outside the store. She admitted

her theft but claims that everyone there does it and she is being singled out. The claimant also wrote on her corrective action statement that the pizza was burnt.

The claimant then offered testimony that the manager herself had shown her how to sneak out defective food products. Some cinnamon rolls were made but they were not big enough to put out to sell. The manager told the claimant to put them in a white bag and told her to place them in the freezer. The claimant rode with the supervisor that day and she grabbed the bag before they left and they split the 'defective' cinnamon rolls. The manager admitted she had done that but claimed the rolls were going to be thrown away. The employer's policy specifically states that employees must pay for all items they intend to consume, even products that are stale, damaged or outdated.

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 of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the

employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa 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. IDJS, 425 N.W.2d 679 (Iowa 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 Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. Miller v. Employment Appeal Board, 423 N.W.2d 211 (Iowa App. 1988).

The claimant was discharged on August 27, 2010 for admitted theft of a food product. Typically theft is sufficient to result in an employee's disqualification of unemployment insurance benefits. However, in the case herein, the manager not only condoned theft of food products in this store but had instructed the claimant how to sneak out food product so it could not be seen on the surveillance tape. The claimant cannot be penalized for something her manager had deemed to be acceptable. Work-connected misconduct as defined by the unemployment insurance law has not been established in this case and benefits are allowed.

DECISION:

The unemployment insurance decision dated September 24, 2010, reference 01, is reversed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/pjs