

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JENNIFER WELCHER
Claimant

APPEAL NO: 12A-UI-07083-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEYS MARKETING COMPANY
Employer

OC: 05-13-12
Claimant: Respondent (2R)

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 June 5, 2012, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on July 10, 2012 and continued on August 10, 2012. The claimant participated in the hearing with her mother Deb Runge and her future mother-in-law Shirley Lewis. Lori Kelso, Store Manager, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a part-time donut/pizza cook for Casey's from May 17, 2011 to May 18, 2012. On May 14 or 15, 2012, the claimant recorded on the daily planner that she made four salads to provide the employer with the correct number for the day. The second assistant manager noticed there were no salads and when she asked the claimant about it the claimant indicated they had already been sold. The employer believed her until May 18, 2012, when the claimant recorded on the daily planner that she made two batches of donuts as was then norm. Store Manager Lori Kelso and the district manager were in the store that day when it ran out of donuts. They asked the claimant how many batches of donuts she made and she stated she made two batches. Ms. Kelso was suspicious because they had been making two batches of donuts for quite some time and were just recently starting to run out of donuts as well as salads. As a result Ms. Kelso watched the store video covering from 3:00 a.m. to around 7:00 a.m. or 7:30 a.m. when the donut robot was shut off and the claimant only made one batch of donuts. She also checked the video to see if the claimant made salads on the day in question and discovered she did not do so. On April 17, 2012, the claimant was very upset with Ms. Kelso because even though she had complained for months that she had not been trained how to make sub sandwiches when Ms. Kelso had an employee from another store come over to train the claimant and a new employee how to make subs the claimant became

argumentative and displayed negative body language, looks and demeanor. Ms. Kelso had talked to the claimant about her attitude in the past but it had not improved sufficiently so the claimant received a written warning April 22, 2012, for “unprofessional behavior” and putting “employees in an unfriendly environment.” The claimant was not only negative about being trained how to make subs but made negative comments to the new employee. The warning indicated if the claimant did not meet the employer’s expectations regarding her attitude she would face suspension or termination of her employment. The claimant had asked for a transfer several times but her request was denied because Ms. Kelso did not believe she should send a “problem employee” to another store. After the employer discovered the donut situation it terminated her employment for failing to make two batches of donuts and not being honest when asked about it.

The claimant has claimed and received unemployment insurance benefits since her separation from this employer.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job 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.

The employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). While the claimant told Ms. Kelso and the district manager she made two batches of cake donuts, the video surveillance of the store revealed she only made one and that explained why the employer was running out of donuts which obviously cost it revenue. She also was not forthcoming about making the salads; stating she made them but customers bought them all when in fact she had not made any. At that point the employer could not trust the claimant to make the quantities of donuts and salads required to meet the needs of its customers. Between the claimant's dishonesty and negative attitude the employer had no choice but to terminate her employment. Under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits must be denied.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code section 96.3-7. In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

DECISION:

The June 5, 2012, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs