

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

LISA K ZALESKY
1116 – 1ST AVE NW
CEDAR RAPIDS IA 52405

CIGARETTE OUTLET INC
C/o JOSEPH DEPAEPE
STE 104
319 E 2ND ST
MUSCATINE IA 52761

Appeal Number: 05A-UI-03337-HT
OC: 01/30/05 R: 03
Claimant: Respondent (2)

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
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

The employer, Cigarette Outlet, filed an appeal from a decision dated March 14, 2005, reference 01. The decision allowed benefits to the claimant, Lisa Zalesky. After due notice was issued a hearing was held by telephone conference call on April 19, 2005. The claimant participated on her own behalf. The employer participated by Manager Betsy Newman and Supervisor Debra Schnyder.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: Lisa Zalesky was employed by Tobacco Outlet from September 20, 2004 until January 30, 2005. She was a part-time clerk.

The claimant had been warned about not asking for identification of a customer under the age of 30, and for not putting down the actual hours she had worked. On January 29 and 30, 2005, she was a few minutes late to work. On January 27, 2005, she was not at work due to illness but on her time card she wrote she had worked 5:00 p.m. to 9:00 p.m.

On January 30, 2005, Supervisor Debra Schnyder tried to call the store during the claimant's shift but received no answer. She called Manager Betsy Newman and asked her to go to the store and find out if there was a problem. When Ms. Newman arrived she saw two customers leaving the door and going to their cars, and she then discovered the door was locked. When she was able to open the doors she found the claimant inside, on the phone. Ms. Zalesky said she had been restocking, but when Ms. Schnyder arrived a few minutes later, the claimant said she had been on a bathroom break. The claimant was discharged at that time.

Lisa Zalesky has received unemployment benefits since filing a claim with an effective date of January 30, 2005.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant is disqualified. The judge concludes she is.

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).

The claimant's attendance had not been entirely satisfactory, and she had been advised she needed to be sure and ask for identification for anyone under the age of 30. There is a suspicion she was filling out her time card inaccurately, and claiming hours she did not actually work. But the final incident was locking the store, resulting in the loss of customers. The claimant's testimony was that she was on a bathroom break, and she may have been. However, that does not account for why she was on the telephone when Ms. Newman entered the store. Even if the phone was ringing as she exited the bathroom, her primary responsibility would have been to unlock the doors, as she testified herself that she would ignore the phone in order to attend to customers. Her testimony is suspect, especially as she did not assert she was on a bathroom break when questioned by Ms. Newman, and only mentioned this for the first time when she was questioned by the supervisor. The administrative law judge finds these inconsistencies to impair the claimant's credibility. She was discharged for locking the doors to the store without good reason, depriving the employer of revenue by turning away customers. This is conduct not in the best interests of the employer and the claimant is disqualified.

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 claimant has received unemployment benefits to which she is not entitled. These must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of March 14, 2005, reference 01, is reversed. Lisa Zalesky is disqualified and benefits are withheld until she has earned ten times her weekly benefit amount, provided she is otherwise eligible. She is overpaid in the amount of \$396.00.

bgh/pjs