

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

TOD H KELLOW
107½ W SALEM AVE
INDIANOLA IA 50125

CASEY'S MARKETING COMPANY
CASEY'S GENERAL STORE
c/o TALX UC EXPRESS INC
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 05A-UI-00764-BT
OC: 02/15/04 R: 02
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 for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Casey's General Store (employer) appealed an unemployment insurance decision dated January 14, 2005, reference 02, which held that Tod Kellow (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on February 8, 2005. The claimant participated in the hearing. The employer participated through Ellen Champlin, Store Manager.

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 full-time cashier/cook from April 8, 2004 through December 20, 2004. He was discharged for violating company policy and breaking state law by selling cigarettes to a minor. A 17-year-old minor purchased cigarettes on December 20, 2004 and the claimant did not ask for any identification, claiming the minor looked at least 27 years old. All employees received a memorandum on May 8, 2004, which reminded the employees of the policy regarding cigarette sales. The employer had heard the claimant had sold cigarettes to minors so she wrote a note on the back of his memo advising him specifically he needed to verify age by checking identification. The claimant does not remember the warning. The claimant knew the policy and knew that the police had set up a "sting operation" on that store on a previous occasion, as he claimed that he passed that time. In addition to asking the customer to look at identification cards demonstrating the age, the claimant also has the use of a machine that can verify age. He did neither on December 20, 2004 and was issued a citation by the police.

The claimant filed a claim for unemployment insurance benefits effective February 15, 2004 and has received benefits after the separation from employment in the amount of \$1,855.00.

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 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 employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982).

The claimant was discharged for selling cigarettes to a 17-year-old minor in violation of store policy and state law. The selling of cigarettes by a clerk to a minor is a criminal act with substantial consequences to the retailer. The claimant felt he was "entrapped" by the police on December 20, 2004 because they sent a minor, who looked older, into the store to buy cigarettes. A reasonable person would at least question the age of a 17-year-old person, even if they might look older since there is a significant difference between a 17-year-old minor and a 27-year-old adult. However, even if the claimant believed this person looked older, he reported he knows that the police sometimes "send in someone who looks older" to purchase cigarettes since it had been done before in that store. Since he believed this, it would seem that he would be ever more diligent in requesting identification. The claimant's violation of a known work rule was a willful and material breach of the duties and obligations to the employer and a substantial disregard of the standards of behavior the employer had the right to expect of the claimant. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The unemployment insurance decision dated January 14, 2005, reference 02, is reversed. The claimant is not eligible to receive unemployment insurance benefits because he was discharged from work for misconduct. Benefits are withheld until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant is overpaid benefits in the amount of \$1,855.00.

sdb/pjs