

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ALLISON R KAISER

Claimant

APPEAL NO: 12A-EUCU-00152-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING COMPANY

Employer

OC: 07/10/11

Claimant: Respondent (1)

Section 96.5-2-a – Discharge
Section 96.7-2-a(2) – Charges Against Employer's Account

STATEMENT OF THE CASE:

Casey's Marketing Company (claimant) appealed a representative's April 11, 2012 decision (reference 03) that concluded Allison R. Kaiser (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on May 10, 2012. The claimant participated in the hearing and presented testimony from one other witness, Briana Biechler. Karla Fenske appeared on the employer's behalf. 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.

ISSUES:

Was the claimant discharged for work-connected misconduct? Is the employer's account subject to charge?

OUTCOME:

Affirmed. Benefits allowed. Employer is exempt from charge in current benefit year.

FINDINGS OF FACT:

The claimant started working for the employer on October 18, 2011. She worked part time (about 12 hours per week) as a cashier/kitchen worker in the employer's Freeport, Iowa store. Her last day of work was February 25, 2012. The employer discharged her on March 1, 2012. The reason asserted for the discharge was failing to wash and change out containers from the sub bar on February 25 after prior unrelated issues. On January 6, 2012 the claimant was given two write-ups for an improper transaction on January 4 and for allowing a friend to loiter around the store on December 18. On or about February 11 the employer verbally reprimanded the claimant for listening to music on her cell phone in the sub area. On February 17 the employer gave the claimant a written warning for being a no-call/no-show on February 13 after agreeing to cover a coworker's shift and then forgetting to do so. The written warnings all indicated that if the specified conduct continued, further discipline including potential termination could occur.

The February 17 warning was not designated that it was a final warning or that if there were any other problems of any kind, the claimant was likely to be discharged.

The employer asserted that on February 25 the claimant did not wash or change out the containers on the sub bar. The claimant acknowledged that she failed to change out the containers as she became distracted by the fact that there was a gas leak outside the store during her shift that day. On or about February 27 the store manager, Fenske, left a message indicating that she wished to speak to the claimant sometime that week before the claimant's next shift; no specific day and time was indicated. The claimant attempted to catch Fenske on one day, but missed her. On March 1 Fenske communicated with the claimant by phone, indicating that the claimant was discharged.

The claimant established an unemployment insurance benefit year effective July 10, 2011. After the separation she reopened the claim by filing an additional claim effective February 26, 2012.

REASONING AND CONCLUSIONS OF LAW:

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. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, 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 is misconduct that warrants denial of unemployment insurance benefits are two separate matters. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is her failure to wash and change out the containers on February 25 after the prior warnings for unrelated issues. Misconduct connotes volition. *Huntoon*, supra. The claimant had not previously been effectively warned that any future problems after the unrelated warnings would place her job in jeopardy. *Higgins v. IDJS*, 350 N.W.2d 187 (Iowa 1984). There is no evidence the claimant intentionally failed to wash or change out the containers on February 25. Under the circumstances of this case, the

claimant's becoming distracted because of the gas leak and forgetting to wash or change out the containers on that date was the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence in an isolated instance, and was a good faith error in judgment or discretion. The employer has not met its burden to show disqualifying misconduct. *Cosper*, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

The final issue is whether the employer's account is subject to charge. An employer's account is only chargeable if the employer is a base period employer. Iowa Code § 96.7. The base period is "the period beginning with the first day of the five completed calendar quarters immediately preceding the first day of an individual's benefit year and ending with the last day of the next to the last completed calendar quarter immediately preceding the date on which the individual filed a valid claim." Iowa Code § 96.19-3. The claimant's base period began April 1, 2010 and ended March 31, 2011. The employer did not employ the claimant during this time, and therefore the employer is not currently a base period employer and its account is not currently chargeable for benefits paid to the claimant.

DECISION:

The representative's April 11, 2012 decision (reference 03) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible. The employer's account is not subject to charge in the current benefit year.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/css