

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JERRAMIE M GUTIERREZ

Claimant

APPEAL NO. 10A-UI-08400-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING COMPANY

Employer

OC: 05/09/10

Claimant: Respondent (2-R)

Section 96.5(2)a – Discharge for Misconduct

Section 96.3(7) – Recovery of Overpayments

STATEMENT OF THE CASE:

Casey's Marketing Company filed an appeal from a representative's decision dated June 3, 2010, reference 01, which held that no disqualification would be imposed regarding Jerramie Gutierrez' separation from employment. After due notice was issued, a hearing was held by telephone on July 29, 2010. Mr. Gutierrez participated personally. The employer participated by Amy Miell, Store Manager.

ISSUE:

At issue in this matter is whether Mr. Gutierrez was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

Having heard the testimony and having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Gutierrez was employed by Casey's from January 25, 2009 until May 7, 2010. He was last employed full time as an assistant manager. He was discharged from the employment due to dishonesty.

On the evening of May 1, 2010, a customer left her Blackberry phone at the store. It was retrieved by another customer who turned it over to a store employee, John. John placed the phone in a drawer behind the register. Mr. Gutierrez opened the store on the morning of May 2 and was there at 4:00 a.m. At approximately 5:30 a.m., he opened the drawer containing the Blackberry, removed it, and placed it in his pocket. These actions were observed on video surveillance. At some point on May 2, the customer who had lost the phone came to the store. When the phone could not be located, employees were asked if they had seen the phone. Mr. Gutierrez was called at home and asked if he had seen the phone. He replied "no." He did not call back to offer any explanation for his response.

On May 3, the store manager again contacted Mr. Gutierrez by phone and asked him about the phone. He indicated he had no knowledge of the phone. The parents of the customer who lost the phone filed charges with the local police. The police went to Mr. Gutierrez' home on the

evening of May 3. At that time, he told the officer that he had placed the phone in the manager's office. The phone was never located and Casey's paid \$379.00 to replace it. Because he had been observed removing the phone and because he denied any knowledge of it, Mr. Gutierrez was discharged on May 7, 2010.

Mr. Gutierrez filed a claim for job insurance benefits effective May 9, 2010. He has received a total of \$4,114.00 in benefits since filing the claim.

REASONING AND CONCLUSIONS OF LAW:

An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Mr. Gutierrez was discharged for theft and dishonesty. If he did not take the phone for his own use, he had two opportunities to tell the employer what happened to it. According to his testimony, he had moved the phone from the drawer up front to the manager's office. He knew or should have known that the person who placed it the drawer might wonder where it went. However, when he was initially contacted about the phone on May 2, he did not say he moved it, he said he had not seen it.

Mr. Gutierrez was again contacted by management asking about the phone on May 3. Instead of explaining what he had done with the phone, he indicated no knowledge of the phone. Since he later told the police that the phone was in the manager's office, it must be concluded that his statements to the employer on May 2 and 3 were false. If he had not taken the phone from the store for his own use, there would seemingly be no reason for him to give false answers to his employer. The administrative law judge is not inclined to believe he was ignorant of what the employer was talking about when they asked about the phone. Since he had moved the phone, he had to have known what phone was being discussed. The employer had the right to expect Mr. Gutierrez to be honest in his dealings with management. His conduct in deliberately giving false statements on two occasions was contrary to the type of behavior the employer had the right to expect, especially from a management employee.

Since the phone was never located after Mr. Gutierrez removed it from the drawer, the administrative law judge must conclude that he removed the phone. His actions constituted theft. Although the phone did not belong to Casey's, it did not belong to him either. Another employee placed the phone in a drawer until the owner could claim it. As such, the employer assumed responsibility for it. The employer had the right to expect that employees will not only refrain from stealing from the employer but from its customers as well. Inasmuch as Mr. Gutierrez conduct was clearly contrary to the employer's standards, benefits are denied.

Mr. Gutierrez has received job insurance benefits since filing his claim. Based on the decision herein, the benefits received now constitute an overpayment. As a general rule, an overpayment of job insurance benefits must be repaid. Iowa Code section 96.3(7). If the overpayment results from the reversal of an award of benefits based on an individual's separation from employment, it may be waived under certain circumstances. An overpayment will not be recovered from an individual if the employer did not participate in the fact-finding interview on which the award of benefits was based, provided there was no fraud or willful misrepresentation on the part of the individual. This matter shall be remanded to Claims to determine if benefits already received will have to be repaid.

DECISION:

The representative's decision dated June 3, 2010, reference 01, is hereby reversed. Mr. Gutierrez was discharged by Casey's for misconduct in connection with his employment. Benefits are denied until he has worked in and been paid wages for insured work equal to ten times his weekly job insurance benefit amount, provided he is otherwise eligible. This matter is remanded to Claims to determine the amount of any overpayment and whether Mr. Gutierrez will be required to repay benefits.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/css