

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SHERRY K ACKERMAN
Claimant

APPEAL NO. 17A-UI-08492-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING COMPANY
Employer

**OC: 07/23/17
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Casey's Marketing Company (employer) appealed a representative's August 9, 2017, decision (reference 01) that concluded Casey's Marketing Company (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for September 6, 2017. The claimant participated personally. The employer participated by Jennifer Meyer, Area Supervisor; Rhaea Ramsey, First Assistant Manager; and Alisha Weber, Unemployment Insurance Consultant. Exhibit D-1 was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

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 hired on April 27, 2010, as a full-time store manager. About twenty employees worked in the claimant's store. The claimant signed for receipt of the employer's handbook on April 27, 2010. The handbook prohibits inappropriate or harassing conduct.

On October 17, 2012, the employer issued the claimant a written warning. An elderly hearing impaired employee asked the claimant if she would write a note indicating she could not talk on the telephone if the folks called her for jury duty because of her inability to hear. The claimant complied and on October 17, 2012, the employer issued her a warning for interfering in an employee's responsibility to answer a call for jury duty. On August 5, 2017, the employer issued the claimant a written warning for failure to report an employee's use of the word "fag" to human resources. The handbook does not indicate there is an obligation to report to human resources. The employer notified the claimant both times that further infractions could result in termination from employment.

On June 9, 2017, the area supervisor received a complaint from an employee. The employee said she overheard the claimant call a female employee a "cunt". The area supervisor called human resources on June 9, 2017, and human resources advised her to get statements from employees. The original complainant could not be reached. The area supervisor asked three of twenty employees if they heard the claimant call the female employee a cunt. The claimant denied making the comment. The female employee had not heard the comment but heard of it. One of the three had heard the claimant say this and she was asked to give a written statement on July 15, 2017. This person could not remember when the claimant made the comment.

The claimant and her area supervisor were talking about the female employee in the claimant's office in July 2017. The claimant called the female employee a bitch. The area supervisor told the claimant she should not say that and then went to talk to the employee. When the area supervisor returned she said, "You're right. She is a bitch". On July 24, 2017, the district manager terminated the claimant for inappropriate conduct.

The claimant filed for unemployment insurance benefits with an effective date of July 23, 2017. The employer participated personally at the fact finding interview on August 7, 2017, by Alisha Weber.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r.871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incident provided by the employer was reported on June 9, 2017. The claimant was not discharged until July 24, 2017. The employer has failed to provide any evidence of willful and deliberate misconduct which was the final incident leading to the discharge and disqualification may not be imposed.

DECISION:

The representative's August 9, 2017, decision (reference 01) is affirmed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/rvs