

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BECKY L SHEWMAKE

Claimant

APPEAL NO. 12A-UI-02265-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING COMPANY

Employer

OC: 01/15/12

Claimant: Respondent (2-R)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed an appeal from the February 22, 2012 (reference 01) decision that allowed benefits. After due notice was issued, a hearing was held by telephone conference call on March 21, 2012. Claimant participated. Employer participated through area supervisor Diana Fossum, store manager and supervisor Kristie Studer, and human resources specialist Melinda Karl. Employer's Exhibit One was admitted to the record.

ISSUE:

Did employer discharge claimant for reasons related to job misconduct sufficient to warrant a denial of benefits and if so, was she overpaid benefits as a result?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a cashier/cook from April 22, 2011 and was separated from employment on January 23, 2012. Her last day of work was January 19. A background check was conducted on January 18, 2012. No background check was conducted when she was hired and the employer does not generally conduct preemployment background checks but follows up if they are prompted by information during the employment. Iowa courts online requires birthdates and the employer does not request this on the application to avoid age discrimination. Her job application asked for information of any criminal conviction other than a routine traffic citation. Claimant reported a felony charge of a third OWI in 2001, which infers a first (November 2000) and second (June 2001) OWI charge. In January 2012 someone reported to the employer they believed she had a more extensive criminal history than the employer knew so it conducted a background check and found information supporting convictions for the following charges:

May 1996 assault (Claimant reached the age of 18 on August 18, 1996); November 1996 failure to have valid license/permit, trespass, operating a vehicle without consent; February 1997 fifth degree theft; July 1997 fifth degree theft, trespass; February 1998 assault causing bodily injury; March 1998 assault causing bodily injury; December 1998 fifth degree theft; April 1999 fifth

degree theft; May 1999 leaving scene or injury accident, fifth degree criminal mischief, assault, fifth degree theft; September 1999 criminal mischief fifth degree; November 1999 driving while license denied, suspended or revoked; January 2001 driving while denied or revoked; July 2002 possession of a controlled substance; August 2002 driving while license denied or revoked; and February 2003 financial liability accident. (Employer's Exhibit 1)

Claimant received unemployment benefits after the separation on a claim with an effective date of January 15, 2012.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment due to job-related misconduct.

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.

Employer has presented substantial and credible evidence that claimant lied on her job application. This is disqualifying misconduct. Benefits are denied.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

Because claimant's separation was disqualifying, benefits were paid to which claimant was not entitled. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code § 96.3(7). In this case, claimant has received benefits but was not eligible for those benefits.

DECISION:

The February 22, 2012 (reference 01) decision is reversed. Claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

REMAND:

The matter of determining the amount of the potential overpayment and whether the overpayment should be recovered under Iowa Code § 96.3(7)b is remanded to the Agency.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/pjs