

**BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319**

PEGGY J SCHMIDT

Claimant,

and

CASEY'S MARKETING CO

Employer.

:
:
:
:
:
:
:
:
:

HEARING NUMBER: 14B-UI-09650

**EMPLOYMENT APPEAL BOARD
DECISION**

NOTICE

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-2-A

DECISION

UNEMPLOYMENT BENEFITS ARE DENIED

The Employer appealed this case to the Employment Appeal Board. Two members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Peggy Schmidt (Claimant) worked as a clerk for Casey's Marketing (Employer) from August 31, 2011 until she was fired on August 21, 2014. She was informed and understood that under the employer's work rules, Employees were prohibited from selling age-restricted products such as alcohol and cigarettes to persons under the legal purchasing age. Violation of this policy may result in termination. Ex. 2. The Employer consistently terminates every person who sells a restricted product to an underage customer.

On August 12, 2014, the Federal Food and Drug Administration conducted a sting operation in the store while the Claimant was working. A minor was able to buy cigarettes from the Claimant. When a restricted product is scanned at the register the register prompts for date of birth and will not continue with the sale until the date of birth is entered. The date of birth can be entered manually or by scanning the customer's identification card, if the card is capable of being scanned. When an identification card is scanned the approval of the sale is automatically blocked by the register if the indicated age is not sufficient to legally allow the customer to make the purchase. The Claimant scanned the card and the register returned that the

sale was restricted. The Claimant nevertheless then typed in a date and overrode the restriction. The Claimant was aware as she handed back the identification with the change that she had put in the wrong number but she gave back the id anyway, and the customer/tester then left. We conclude that the Claimant chose to ignore the mandatory procedures governing such sales.

After management discovered the Claimant had sold cigarettes to a minor, the Employer discharged the Claimant for that reason on August 21, 2014.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2014) provides:

Discharge for Misconduct. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:

The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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 is the meaning which has been given the term in other jurisdictions under similar statutes, and we believe it accurately reflects 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 propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 NW2d 661 (Iowa 2000). "[M]ere negligence is not enough to constitute misconduct." *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 666 (Iowa 2000).

“[M]ere negligence is not enough to constitute misconduct.” Lee v. Employment Appeal Board, 616 N.W.2d 661, 666 (Iowa 2000).

The Claimant testified that she saw that the sale should have not been made *as she was handing the card back*. At that point the Claimant simply had to say “wait a minute” and cancel the sale, even if she had to call a manager over. She instead, by her own admission, simply let the customer leave.

There is no doubt the sale was completed, and a government warning letter issued as a consequence. We conclude the Claimant was guilty of more than mere ordinary negligence, instead we conclude that the Claimant disregarded mandatory procedure. The Claimant understood that the date verification procedure was mandatory every time, and she made the choice to allow the customer to get his card back and leave at a time when she *knew* she should not have made the sale.

The Administrative Law Judge found that the Claimant was guilty of only a single isolated instance of negligence. The problem with this claim is that *even if* we conclude that the record shows some error in entering the date, still the error was caught in time to do something and the Claimant made the choice not to do anything. This was not an error but rather an intentional choice being in direct violation of the mandatory procedures. Given the importance of those procedures, this was a substantial disregard of the Employer’s interests.

Finally, since the Administrative Law Judge allowed benefits and in so doing affirmed a decision of the claims representative the Claimant falls under the double affirmance rule:

871 IAC 23.43(3) Rule of two affirmances.

- a. Whenever an administrative law judge affirms a decision of the representative or the employment appeal board of the Iowa department of inspections and appeals affirms the decision of an administrative law judge, allowing payment of benefits, such benefits shall be paid regardless of any further appeal.
- b. However, if the decision is subsequently reversed by higher authority:
 - (1) The protesting employer involved shall have all charges removed for all payments made on such claim.
 - (2) All payments to the claimant will cease as of the date of the reversed decision unless the claimant is otherwise eligible.
 - (3) No overpayment shall accrue to the claimant because of payment made prior to the reversal of the decision.

Thus the Employer’s account may not be charged for any benefits paid so far to the Claimant for the weeks in question, but the Claimant will not be required to repay benefits already received.

DECISION:

The administrative law judge's decision dated October 16, 2014 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for disqualifying misconduct. Accordingly, she is denied benefits until such time the Claimant has worked in and has been paid wages for insured work equal to ten times the Claimant's weekly benefit amount, provided the Claimant is otherwise eligible. See, Iowa Code section 96.5(2)(a).

No remand for determination of overpayment need be made under the double affirmance rule, 871 IAC 23.43(3), but still the Employer's account may not be charged.

Kim D. Schmett

Ashley R. Koopmans

RRA/fnv