

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**JAKE N PHERIGO**  
Claimant

**CASEY'S MARKETING COMPANY**  
Employer

**APPEAL 18A-UI-03397-NM-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 02/04/18**  
**Claimant: Appellant (2R)**

Iowa Code § 96.5(2)a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the March 8, 2018, (reference 02) unemployment insurance decision that denied benefits based on his discharge for theft. The parties were properly notified of the hearing. A telephone hearing was held on April 9, 2018. The claimant participated and testified. Martha Pherigo was also present as claimant's non-attorney representative and testified. The employer participated through Store Manager Renee Ellsworth. Shanda Volker was also present on behalf of the employer, but did not testify. Employer's Exhibits 1 through 9 were received into evidence.

**ISSUE:**

Was the claimant discharged for disqualifying job-related misconduct?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed part time as a store clerk from April 28, 2017, until this employment ended on March 3, 2018, when he was discharged.

On February 24 and 25, 2018, claimant was observed on surveillance footage consuming merchandise without first paying for it. (Exhibit 5). The employer's policies require employees to pay for any food or beverages before they consume them and to print two receipts, one for themselves and one for the employer's records. (Exhibit 9). Claimant understood this policy. Prior to this incident claimant had received a written warning for similar behavior, on November 26, 2017. (Exhibit 6). Claimant was advised that further incidents could lead to termination.

On March 3, 2018, Ellsworth met with claimant to discuss the situation. Claimant told Ellsworth he believed he had a receipt for the purchase at home, but said receipt was never provided and Ellsworth could find no record of the purchase. Claimant also told Ellsworth, the drink he had consumed was brought from home. Ellsworth went back and watched to footage. She saw claimant had brought the same drink from home, but he consumed that drink and then

proceeded to get another one from the employer's cooler. He then consumed that drink without first paying for it. Claimant was then discharged from employment.

During the hearing claimant had no recollection of taking the employer's property and insisted the drinks he consumed were brought from home. Martha Pherigo further testified that claimant was very recently diagnosed with a degenerative brain disease, either Alzheimer's or dementia, both which can cause forgetfulness and confusion. Pherigo went on to explain that if claimant did take a drink without paying for it, his actions were likely caused by his then-undiagnosed brain disorder.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting 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 of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa

Ct. App. 1984). Misconduct must be “substantial” to warrant a denial of job insurance benefits. *Newman v. Iowa Dep’t of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee’s act is misconduct does not rest solely on the interpretation or application of the employer’s policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

Here, the claimant was discharged for theft from the employer. Theft from an employer is generally disqualifying misconduct, as it shows a deliberate disregard for the employer’s interest. *Ringland Johnson, Inc. v. Hunecke*, 585 N.W.2d 269, 272 (Iowa 1998). In *Ringland*, the Court found a single attempted theft to be misconduct as a matter of law. Here, credible testimony has been provided, which indicates claimant was suffering from an unknown degenerative brain disorder at the time of the final incident. Claimant has no recollection of the incident and credibly testified he only recalled drinking beverages he had brought from home. Given these circumstances, it cannot be shown that claimant’s actions were deliberate. Accordingly, benefits are allowed, provided claimant is otherwise eligible.

At the time of the hearing, information was introduced that brings into question claimant’s ability to work. This matter must be remanded to the benefits bureau of Iowa Workforce Development for initial investigation and determination.

**DECISION:**

The March 8, 2018, (reference 02) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

**REMAND:**

The issue of whether claimant is able to and available for work is remanded to the benefits bureau of Iowa Workforce Development for initial investigation and determination.

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Nicole Merrill  
Administrative Law Judge

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Decision Dated and Mailed

nm/rvs