

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ANGELA R PORTUGUE
Claimant

APPEAL NO: 10A-UI-09090-DWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING COMPANY
Employer

OC: 05/23/10
Claimant: Respondent (1)

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

The employer appealed a representative's June 18, 2010 decision (reference 01) that held the claimant qualified to receive benefits and the employer's account subject to charge because the claimant had been discharged for nondisqualifying reasons. A telephone hearing was held on September 14, 2010. The claimant participated in the hearing with her attorney, Bob Gallagher. Josh Burrows represented the employer. Christy Bowman, the area supervisor, testified on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Did the employer discharge the claimant for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer in August 2008. She worked full time as a store manager. On May 1, 2010, Bowman became the claimant's supervisor. Prior to May 17, 2010, the claimant's job was not in jeopardy and she did not have any problems with cigarette audits.

On May 17, 2010, Bowman gave the claimant a warning to do complete and accurate cigarette counts. The claimant received the warning after the cigarette count she did that day indicated the store had three more packs of cigarettes than the inventory indicated there should be. A couple of hours later when Bowman did a cigarette inventory, she came up short 60 packs of cigarettes. The two then redid the inventory and the claimant came up with the same number as Bowman. After the claimant received a write up for the cigarette audit, she kept having problems with the cigarette count. The counts she had did not match up to the amount the corporate office indicated she should have. Daily, the claimant emailed Bowman to report she had problems with the cigarette count and asked for her assistance.

On May 26, Bowman discovered that on May 7, 11 and 13, a total of 13 packs of cigarettes were rung up on an open key on the claimant's register and these cigarettes were purchased for a penny. Bowman knew the cigarette count on May 22, 24 and 24 was off between 11 to 13

packs. The employer did not find any penny sales after May 17. When Bowman talked to the claimant on May 26, she denied she purchased any cigarettes for a penny. The claimant asserted the donut maker must have used her register. The times the cigarette sales were made occurred when the claimant was not at the register, but was instead in her office. The employer found 192 packs of cigarettes sold for a penny, but no other employee was discharged.

The employer discharged the claimant on May 27. The employer concluded the claimant falsified the cigarette audits and purchased cigarettes for a penny.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges her for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. 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 willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 665 (Iowa 2000).

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

The facts show the claimant's job was not in jeopardy before May 1 and there is no indication she had problems with cigarette audits until after Bowman became her supervisor. Even though the cigarette counts that Bowman and the claimant did on May 17 were not the same, there was a two-hour time span from when the two audits were completed. Since the claimant kept notifying Bowman about problems she had with the cigarette count after May 17, it seems absurd she would ask Bowman to help if she purchased cigarettes for a penny or falsified the cigarette count. It is also noteworthy that while the employer attributed 13 penny cigarette sales to the claimant, the employer found 192 instances of this occurring at the claimant's store.

The evidence indicates there was a problem with the cigarette count at the claimant's store, but the facts do not establish that the claimant falsified cigarette audits or purchased cigarettes for a penny. As the store manager, the employer may hold the claimant responsible for what happens in her store, but she did not commit work-connected misconduct. Therefore, as of May 23, 2010, the claimant is qualified to receive benefits.

DECISION:

The representative's June 18, 2010 decision (reference 01) is affirmed. The employer discharged the claimant for business reasons that do not constitute work-connected

misconduct. As of May 23, 2010, the claimant is qualified to receive benefits, provided she meets all other eligibility requirements. The employer's account is subject to charge.

Debra L. Wise
Administrative Law Judge

Decision Dated and Mailed

dlw/css