

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NATASHA L WESSELS

Claimant

APPEAL NO. 07A-UI-04627-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING COMPANY

Employer

**OC: 03/11/07 R: 04
Claimant: Respondent (2)**

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

Iowa Code section 96.3(7) – Recovery of Overpayment

STATEMENT OF THE CASE:

Caseys Marketing Company filed a timely appeal from the April 25 2007, reference 06, decision that allowed benefits. After due notice was issued, a hearing was held on May 22, 2007 Claimant Natasha Wessels participated. Store Manager Dawn Coffman represented the employer. The administrative law judge took official notice of the Agency's record of benefits dispersed to the claimant.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the claimant was overpaid unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Natasha Wessels was employed by Caseys Marketing Company as a part-time cashier from January 11, 2007 until March 17, 2007, when Store Manager Dawn Coffman and Area Supervisor Karen Dillinger discharged her for purchasing lottery tickets under the legal age.

The conduct that prompted the discharge came to the employer's attention on March 16, 2007, while Ms. Coffman and Ms. Dillinger were reviewing surveillance video in connection with an investigation of cash register shortages. The employer did not conclude that Ms. Wessels was responsible for the cash register shortages. While the employer reviewed the surveillance video, the employer observed Ms. Wessels taking scratch tickets into her possession while she was working at the convenience store cash register. Ms. Wessels purchased approximately 20 lottery scratch tickets during her employment at the convenience store and would purchase up to three tickets at a time. Ms. Wessels would ring up the tickets but not put money in the register at the time she took the tickets into her possession. Ms. Wessels would subsequently put money in the register to cover the cost of the tickets. At the time of the discharge,

Ms. Wessels had most recently purchased lottery tickets from the convenience store on March 11, 2007.

At the time Ms. Wessels started her employment, Ms. Wessels signed an acknowledgment that the employer had certain products that could only be purchased by individuals of legal age to do so. Ms. Wessels was aware that there was an age restriction that applied to individuals wanting to purchase lottery tickets. At that time Ms. Wessels was discharged she was 20 years old. Ms. Wessels had lived in Iowa since the summer of 2004.

REASONING AND CONCLUSIONS OF LAW:

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.

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether

the conduct that prompted the discharge constituted a “current act,” the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

Iowa Code section 99G.30(3) prohibits the sale of lottery tickets to a person under the age of 21 and purchase of lottery tickets by persons under 21.

The administrative law judge listened carefully to Ms. Wessels' testimony and concludes that portions of that testimony are not credible. The administrative law judge finds not credible Ms. Wessels' assertion that she was unaware that she was breaking the law, or Casey's policy, by purchasing lottery tickets under the age of 21 or by selling tickets to a person, herself, under the legal age of 21. The evidence in the record indicates that Ms. Wessels had lived in Iowa for almost three years. Ms. Wessels testified that she had purchased lottery tickets and other age restricted items, cigarettes, from other business establishments in the community. The administrative law judge found Ms. Wessels overly eager to shift responsibility for her conduct onto other individuals, who may or may not have been aware that she was under the legal age to purchase lottery tickets. The greater weight of the evidence indicates that Ms. Wessels was in fact aware that 20-year-olds are not allowed to purchase lottery tickets in the state of Iowa. The evidence further indicates that Ms. Wessels intentionally misappropriated property of the State of Iowa, and/or property of the employer, when she took lottery scratch tickets into her possession without immediately paying for them. The fact that Ms. Wessels subsequently paid for the lottery tickets she had taken did not negate the initial misappropriation. The evidence in the record does establish intentional misconduct that amounted to a willful and wanton violation of the interests of the employer.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Wessels was discharged for misconduct. Accordingly, Ms. Wessels is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged for benefits paid to Ms. Wessels.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

Because Ms. Wessels has received benefits for which she has been deemed ineligible, those benefits constitute an overpayment that Ms. Wessels must repay to Iowa Workforce Development. Ms. Wessels is overpaid \$891.00.

DECISION:

The Agency representative's April 25 2007, reference 06, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The claimant is overpaid \$891.00.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw