IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

SHAWN D DE JONGE
1225 WASHINGTON APT 2
BURLINGTON IA 52601

HARDEES FOOD SYSTEMS INC
C/O TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 04A-UI-10605-RT
OC: 08/29/04 R: 04
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct
Section 96.5-1 – Voluntary Quitting
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Hardees Food Systems, Inc., filed a timely appeal from an unemployment insurance decision dated September 16, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Shawn D. De Jonge. After due notice was issued, a telephone hearing was held on October 21, 2004, with the claimant participating. The employer did not participate in the hearing because the employer did not call in a telephone number, either before the hearing or during the hearing, where any witnesses could be reached for the hearing, as instructed in the notice of appeal. The employer is represented by TALX UC eXpress which is well aware of the need to call in a telephone number if the employer wishes to participate in the

hearing. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a part-time/full-time backline cook from November 2003 until he separated from his employment on July 28, 2004. When the claimant was first hired he was hired as a backline cook. At the time of his hire, he told the employer that that is what he wanted to do. He also told the employer that he did not want to attend to the drive-through window and serve drive-through customers. This was acceptable to the employer. Throughout the claimant's employment he worked as a backline cook until approximately one week before his separation. At that time, the claimant was assigned to the drive-through window. He expressed concerns at this explaining that he did not want to work the drive-through window and had been hired as a cook and not as a drive through window attendant. Nevertheless, the claimant was assigned to the drive-through window for four to five days and he repeatedly expressed concerns each time indicating that he would quit if he was forced to continue. Finally, on or about July 27, 2004 the claimant came to work and was again assigned to the drive-through window and he told the employer that he would not do so. The claimant was then told to go home and call the general manager. The claimant went home and called the general manager and was told to return to work the next day. When the claimant returned to work the next day, July 28, 2004, he was again told to work the drive-through and he refused and was discharged. That was the only reason for the claimant's discharge.

Pursuant to his claim for unemployment insurance benefits filed effective August 29, 2004, the claimant has received unemployment insurance benefits in the amount of $665.00 as follows: $95.00 per week for seven weeks from benefit week ending September 4, 2004 to benefit week ending October 16, 2004.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.

2. Whether the claimant is overpaid unemployment insurance benefits. He is not.

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).

Iowa Code section 96.5-1 provides:

> An individual shall be disqualified for benefits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

871 IAC 24.26(1) provides:

> Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

The first issue to be resolved is the character of the separation. The claimant maintains that he was discharged; the employer seems to maintain that the claimant quit. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant left his employment voluntarily. The employer did not participate in the hearing and provide evidence that the claimant voluntarily left his employment. The claimant credibly testified that he was discharged when he refused to continue to work at the drive-through window when he was hired to be a backline cook and at the time of his hire, had told the employer that he did not want to work the drive-through window and was told that was acceptable. Accordingly, the administrative law judge concludes that the claimant was discharged on July 28, 2004.

In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code section 96.6(2)

and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer did not participate in the hearing and provide sufficient evidence of deliberate acts or omissions on the part of the claimant constituting a material breach of his duties and/or evincing a willful or wanton disregard of the employer's interests and/or in carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. The claimant credibly testified that he was discharged when he refused to work the drive-through window. The claimant credibly testified that when he was first hired, in November 2003, he was hired specifically as a backline cook. At the time of his hire, he told the employer that he did not want to work the drive-through window and this was acceptable to the employer. The claimant then worked as a backline cook throughout his employment until approximately one week before his discharge. At that time, he was assigned to the drive-through window despite his expressions of concern. The claimant was assigned to the drive-through window for four to five days and each time he expressed concerns about this and indicated that he would quit if he was forced to continue to work the drive-through window. The claimant had trouble with customers and did not want to work the drive-through window and had not been hired to do so and had been specifically told when he was hired that he would not have to. Finally, on or about July 27, 2004 when the claimant came to work he was again assigned to the drive-through window and he refused to work there. He was told to go home and call the general manager. He did so and the general manager told the claimant to go to work the next day. The claimant did so and again was sent to the drive-through window and again he refused to work there and the claimant was discharged. Under these circumstances, the administrative law judge concludes that the claimant's refusal to work the drive-through window was justified. The administrative law judge does not condone employees who refuse to do work as assigned, but in this case, the claimant was not hired to work the drive-through window and at the time of his hire had specifically indicated that he did not want to do so and he was told that he would not have to. The claimant then worked approximately nine months as a backline cook, which was the position for which he was hired. Then the claimant was assigned to the drive-through window and after doing it for four or five days and repeatedly expressing concerns he finally refused because he was having problems at the drive-through window. Under these circumstances, the administrative law judge concludes that the claimant's refusal was not a deliberate act constituting a material breach of his duties nor did it evince willful or wanton disregard of the employer's interests nor was it carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. At the very most, the claimant's refusal was failure in good performance as a result of inability or incapacity and is not disqualifying misconduct. Accordingly, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct and, as a consequence, he is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits, and misconduct, to support a disqualification from unemployment insurance benefits, must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant his disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided he is otherwise eligible.

Even should the claimant's separation be considered a voluntary quit, the administrative law judge would conclude that the claimant voluntarily quit with good cause attributable to the employer. When the claimant was hired, he was hired as a backline cook and specifically told at his request that he would not have to work the drive-through window. The claimant worked

as a backline cook for approximately nine months when he was told to work the drive through window. Assigning the claimant to the drive-through window under these circumstances would be a willful breach of his contract of hire by the employer which breach would be substantial involving drastic modification and type of work. Therefore, the administrative law judge would conclude if the claimant had voluntarily quit that he voluntarily quit with good cause attributable to the employer and would still not be disqualified to receive unemployment insurance benefits.

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.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of $665.00 since separating from the employer herein on or about July 28, 2004 and filing for such benefits effective August 29, 2004. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision dated September 16, 2004, reference 01, is affirmed. The claimant, Shawn D. De Jonge, is entitled to receive unemployment insurance benefits provided he is otherwise eligible. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out of his separation from the employer herein.

kjf/tjc