

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CARLA L LPETERSEN
Claimant

APPEAL NO. 13A-UI-08618-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KWIK TRIP INC
Employer

OC: 06/23/13
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Kwik Trip, Inc. filed a timely appeal from a representative's decision dated July 16, 2013, reference 01, which held claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held on August 29, 2013. The claimant participated. The employer participated by Mr. Brett Gooden, Director of Loss Prevention. Employer's Exhibits A, B, C, D, E, F, G, H and I were received into evidence.

ISSUE:

The issue in this matter is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Carla Petersen was employed by Kwik Trip, Inc. from June 18, 2012 until June 26, 2013 when she was discharged from employment. Ms. Petersen worked as a part-time clerk and was paid by the hour. Her immediate supervisor was Lisa Thompson.

Ms. Petersen was discharged after it was determined that she had on more than one occasion taken discarded foodstuffs from a company dumpster and had not paid the company for the discharged food.

A company employee had notified the Loss Prevention Department of Ms. Petersen's conduct and a security video showed the claimant removing two 12-packs of cookies from the dumpster and placing them in her automobile. Mr. Gooden personally interviewed the claimant about the matter and determined that the activity had taken place on more than one occasion. Although it appears that Ms. Petersen understood that the policy of paying for food taken or consumed from the store, it is not clear that she understood the policy with respect to discarded food. Because the claimant had admitted to taking food from the dumpster on more than one occasion, a decision was made to terminate Ms. Petersen from her employment.

It is the claimant's position that she did not know that removing discarded food would be in violation of company policy and that she had observed other employees doing it in the past.

The company's Code of Conduct policy provides that employees are subject to discharge for theft of company property and the Loss Prevention Policy states that all merchandise must be paid prior to being consumed or taken from the premises. It also provides that employees should have a coworker ring up the purchase, etcetera. The company's Code of Conduct refers to dishonesty in any form or degree and refers to unauthorized removal or use of property belonging to the company. The Loss Prevention Policy makes reference, however, to "consuming spoilage of any type."

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes intentional misconduct sufficient to warrant the denial of unemployment insurance benefits. It does 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.

The employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating the claimant but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What

constitutes misconduct justifying termination of an employee and what misconduct warrants the denial of unemployment insurance benefits are two separate decisions. Pierce v. Iowa Department of Job Service, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge may not necessarily be serious enough to warrant a denial of unemployment insurance benefits. Such misconduct must be “substantial.”

In the case at hand the employer’s policies and code of conduct policies refer to a number of scenarios related to theft or misappropriation of company property or funds. The single portion of the policy that relates to the type of behavior in this case is the employer’s reference to the policy to “consuming spoilage of any type.” The claimant testified that she was not aware that removing a small amount of discarded company product that had been put in a dumpster would violate company policies. The claimant further testified that she had observed other employees doing it without issue.

The administrative law judge concludes based upon the totality of the evidence in the record that Ms. Petersen did not equate her conduct with misappropriating company funds or property for consuming foodstuffs of the company without paying for them. While the categorization of consuming spoilage of any type may have been clear to the employer, it was not clear enough to the claimant in the way that it was presented in company policies or codes of conduct to establish that the claimant had intentionally violated a known company rule and that her conduct was sufficient to warrant the denial of unemployment insurance benefits.

While the management decision to terminate Ms. Petersen from her employment for this reason may have been a sound decision from a management viewpoint, the evidence in the record does not establish intentional misconduct sufficient to warrant the denial of unemployment insurance benefits in this matter. Therefore, benefits are allowed providing the claimant is otherwise eligible.

DECISION:

The representative’s decision dated July 16, 2013, reference 01, is affirmed. The claimant was discharged under non-disqualifying conditions. Unemployment insurance benefits are allowed, providing she is otherwise eligible.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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