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

DONNA R JONES
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SPENCER IA 51301

US BANK NATIONAL ASSOCIATION
C/O JON-JAY ASSOCIATES INC
PO BOX 182523
COLUMBUS OH 43218-2523

Appeal Number: 05A-UI-00155-RT
OC: 12-05-04 R: 01
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant, Donna R. Jones, filed a timely appeal from an unemployment insurance decision dated December 28, 2004, reference 01, denying unemployment insurance benefits to her. After due notice was issued, a telephone hearing was held on January 21, 2005, with the claimant participating. Debra Green was available to testify for the claimant but not called because her testimony would have been repetitive and unnecessary. The employer, US Bank National Association, 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 appears to be represented by Jon-Jay Associates, Inc., which is well aware of the need to call in a telephone number prior to the hearing if the employer wants to participate in the hearing. The

administrative law judge takes official notice of Iowa Workforce Development 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 full-time teller from June 2000 until she was discharged on December 6, 2004. On December 3, 2004, the claimant was short $100.00 in her cash drawer. The claimant's supervisor, Mary, was present but the branch manager, Diane Harmening, was not. The claimant informed her supervisor of the shortage. The supervisor called Ms. Harmening. The claimant's supervisor then told the claimant to call in on Monday, December 6, 2004. The claimant had been previously told by Ms. Harmening that if her cash drawer was ever short over $100.00 again she would be discharged. The claimant called her supervisor as instructed on December 6, 2004. She asked if she should come in to work and her supervisor said yes. The claimant then asked if she was fired and her supervisor said yes but the claimant was to come in and it would be alright to work Monday and Tuesday but she was fired and would have to submit her keys. The claimant came in and worked on December 6, 2004 to finish up some matters that she had pending. She turned in her keys at the end of the day and never returned to the employer.

Previously, in September 2004, the claimant had been short $381.00 because she used a wrong procedure. At that time the claimant quickly retrieved the money that had been short. For this the claimant received a written warning. The claimant was then short in the latter part of November or early December $475.00 because she gave a bundle of $20.00 bills to a customer instead of a bundle of $1.00 bills. This money was also immediately recovered. However, at this time the claimant was told by the branch manager, Diane Harmening, that she would be discharged if her cash drawer was ever short again over $100.00. There were no other reasons for the claimant's discharge and she had received no other warnings or disciplines.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant’s separation from employment was a disqualifying event. It was not.

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.

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 first issue to be resolved is the character of the separation. The claimant testified credibly that she was discharged when she was told by her supervisor, Mary, in a phone call on December 6, 2004 that she was fired and then it was reiterated to the claimant when she came to work that day and then the claimant had to turn in her keys. The claimant repudiates telling the fact finder that no one had ever told her that she was fired. In the absence of any evidence to the contrary, the administrative law judge is constrained to conclude that there is not a preponderance of the evidence that the claimant both demonstrated an intention to terminate the employment relationship and performed an overt act to carry out that intention, as required for a voluntary quit by Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 608, 612 (Iowa 1980). Accordingly, the administrative law judge concludes that the claimant did not leave her employment voluntarily but was discharged on December 6, 2004. The issue then becomes whether the claimant was discharged for disqualifying misconduct.

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. Although it is a close question, 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 failed to participate in the hearing and provide sufficient evidence of deliberate acts or omissions on the part of the claimant constituting a material breach of the claimant's duties and/or evincing a willful or wanton disregard of the employer's interest and/or in carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. The claimant credibly testified that she was short in her cash drawer three times, as set out in the findings of fact. In September the claimant received a written warning and in the latter part of November or early December she was informed that one more cash shortage would result in her discharge. The

claimant had a third cash shortage and was discharged. There is no evidence that the claimant's cash shortages were willful or deliberate. However, the more difficult question here is whether the claimant's actions were carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. The claimant credibly testified to explanations for her cash shortages and further credibly testified that the first two cash shortages were immediately recovered. In one case the claimant used the wrong procedure and in another case she mistakenly gave out a bundle of $20.00 bills instead of $1.00 bills. There is no evidence as to why the claimant was short on December 3, 2004. In the absence of any evidence to the contrary, although it is a close question, the administrative law judge is constrained to conclude that these acts do not establish sufficient recurring negligence to be disqualifying misconduct. Rather, the claimant's acts appear to be mere inefficiency, unsatisfactory conduct, failures in good performance as a result of inability or incapacity, or ordinary negligence in isolated instances and are not disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged for but not for disqualifying misconduct and, as a consequence, she 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 is constrained to conclude that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant her disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided she is otherwise eligible.

DECISION:

The representative's decision dated December 28, 2004, reference 01, is reversed. The claimant, Donna R. Jones, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she was discharged but not for disqualifying misconduct.

b/b