IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CHARLES B LEWIS
Claimant

KWIK SHOP INC
Employer

APPEAL NO. 06O-UI-09619-L

ADMINISTRATIVE LAW JUDGE DECISION

OC: 05-21-06 R: 04
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the June 8, 2006, reference 02, decision that denied benefits. After due notice was issued, a hearing was held on December 5, 2006 in Davenport, Iowa. Claimant participated. Employer participated through Marilyn Kottas and was represented by Jaqueline Jones of Employers Unity by telephone conference call since employer no longer owns the store in question and there is no employer witness in the area.

ISSUE:

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time clerk through May 1, 2006 when he was discharged after he sold tobacco to a minor after having looked at the identification and asked the minor how old he was on April 30. The minor responded that he was 18 and claimant did not catch the two month age differential. Claimant had signed a tobacco compliance policy but had not received the video training employer claimed. The policy requires the clerk to id anyone who appears to be under the age of 27. During private sting operations, claimant caught eight out of nine under age potential purchasers.

Claimant had been working multiple shifts and had worked that morning until 4:30 a.m. before returning to work by 3:00 p.m. that afternoon. Claimant had never been cited by the police before this and he reported the citation to employer as soon as it was issued. The registers are not set up to scan a driver's license or enter a date of birth for more certainty in age verification.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

Iowa Code § 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). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988).

Employer's policy of requiring identification of age from patrons under the age of 27 when purchasing tobacco or alcohol is too subjective. Claimant made a one-time simple mistake due to fatigue when he failed to catch the two-month age discrepancy. While the conduct may have warranted discharge according to employer's expectations of one violation, it did not rise to the level of disqualification. Benefits are allowed.

DECISION:

The June 8, 2006, reference 02, decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/css