

BEFORE THE  
EMPLOYMENT APPEAL BOARD  
Lucas State Office Building  
Fourth floor  
Des Moines, Iowa 50319

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KAREN N WILSON

Claimant,

and

MC GEE'S INC

Employer.

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HEARING NUMBER: 09B-UI-15206

EMPLOYMENT APPEAL BOARD  
DECISION

**NOTICE**

**THIS DECISION BECOMES FINAL** unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT IS FILED WITHIN 30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

**SECTION: 96.5-1**

**DECISION**

**UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE**

The claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

**FINDINGS OF FACT:**

The claimant, Karen N. Wilson, was employed by McGee's, Inc. from January 1, 2001 through August 26, 2009 as a full-time bar manager. (Tr. 2, ) On Wednesday, August 26<sup>th</sup>, the claimant reported to work about 4:30 p.m. to begin cooking in the kitchen. She turned on the fryer and the grill to which the employer came behind to turn them off telling her not to waste gas. (Tr. 3) She proceeded to the refrigerator and discovered that it was 85 degrees inside. (Tr. 3-4) Ms. Wilson immediately contacted

The refrigerator repairman came and was also sprawled over the floor working to fix the unit, which hindered the claimant's ability to work in the kitchen. She smoked a cigarette. (Tr. 5, 6, 8) Mr. McGee, the owner, directed Ms. Wilson to get to work, i.e., start cleaning the kitchen. (Tr. 4-5, 6-7, 8) She informed him that there was no hot water, which was also the case the previous day. (Tr. 3-4, 9) The employer told her if she wasn't going to do any cleaning in the kitchen, she should go home. (Tr. 2, 3-4, 5, 10, 11) Ms. Wilson did not want to go home (Tr. 9-10), but she followed his directive.

The following day, Ms. Wilson called the employer to find out what time he wanted her to come to work. (Tr. 2, 3) He told her that he didn't need her to come in; she went in the following day to inquire about what was going on and Mr. McGee told her that she quit.

### REASONING AND CONCLUSIONS OF LAW:

The record establishes that the claimant reported to work and intended to proceed with her responsibilities, but for the mishap with the refrigerator and the lack of hot water. The fact that the refrigerator repairman was in the way, it was reasonable for the claimant to ask the employer what she should do. When she was told to clean the kitchen, her response that there was no hot water was merely a statement of fact and not a refusal to do any work. Both parties agree that the employer directed Ms. Wilson to go home if she didn't work at cleaning the kitchen. The claimant testified that she had no intention to quit when she came in that day; rather, she complied with the employer's directive since she reasonably believed that the lack of hot water prevented her from cleaning.

The employer's argument that she quit lacks merit. "[Q]uitting requires an intention to terminate employment accompanied by an overt act carrying out the intent." FDL Foods, Inc. v. Employment Appeal Board, 460 N.W.2d 885, 887 (Iowa App. 1990), accord Peck v. Employment Appeal Board, 492 N.W.2d 438 (Iowa App. 1992). Ms. Wilson vehemently denied that she intended to quit, which is corroborated by the fact that she called the employer the next day to ask about her hours. When he told her he didn't need her, she had no idea her employment relationship was severed. It wasn't until she came in that Friday that the employer told her that he considered her to have quit. Substantial evidence does not support the employer's alleged conclusion given the claimant's subsequent behavior the day after being told to go home. Rather, the claimant provided credible testimony that she did not intend to quit and it was the employer who, initiated her separation.

871 IAC 24.1(113) "c" provides:

*Separations.* All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.

*Discharge.* A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.

Iowa Code Section 96.5(2)(a) (2009) provides:

*Discharge for Misconduct.* If the department finds the individual has been discharged for misconduct in connection with the individual's employment:

The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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 Iowa Supreme court has accepted this definition as reflecting the intent of the legislature. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665, (Iowa 2000) (quoting Reigelsberger v. Employment Appeal Board, 500 N.W.2d 64, 66 (Iowa 1993)).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 NW2d 661 (Iowa 2000).

Although the employer did not tell Ms. Wilson she was fired, the fact that he "didn't need her" on Thursday or Friday and told her she quit when she was ready and willing to report to work is essentially a discharge for which misconduct must be established. Here, the employer submitted no evidence to satisfy that burden.

**DECISION:**

The administrative law judge's decision dated November 12, 2009 is **REVERSED**. The claimant was discharged for no disqualifying reason. Accordingly, she is allowed benefits provided she is otherwise eligible.

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John A. Peno

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Elizabeth L. Seiser

AMG/ss

**DISSENTING OPINION OF MONIQUE F. KUESTER:**

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

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Monique F. Kuester

AMG/ss