

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MICHALLE L COCHRANE
Claimant

APPEAL NO. 08A-UI-00825-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**KRAUS FOODS INC
DAIRY QUEEN**
Employer

**OC: 12/30/07 R: 03
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Dairy Queen (employer) appealed a representative's January 18, 2008 decision (reference 01) that concluded Michalle Cochrane (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for February 7, 2008. The claimant participated personally. The employer participated by Jeff Wieland, Support Services Director. The employer offered and Exhibit One was received into evidence.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on September 6, 2007, as a part-time crew leader. The claimant's boyfriend was upset with her and threatened to get her fired. He was friends with an ex-employee who had access to the workplace. On December 28, 2007, the claimant completed her closing procedures by putting a case of frozen hamburgers in the freezer, making sure the grill was off, starting the report run, shutting off lights and locking up. The claimant's actions could be seen from outside through the glass or plastic windows.

On December 31, 2007, an anonymous person went to the store manager's house. He said he had a past relationship with the claimant and knew the claimant stole a case of hamburgers from the employer. He gave the store manager a frozen burger as proof. The employer viewed the videotape of the claimant on December 28, 2007. The employer saw the claimant carry the case of burgers and then the claimant could not be seen on the tape. The claimant left shortly after this. The employer questioned the claimant on January 1, 2008, and she denied taking the case from the employer. The employer terminated the claimant on January 5, 2008.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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). If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682 (Iowa 1976). The employer had the power to present the testimony of the store manager but chose not to do so. The employer did not meet its burden of proof to show misconduct. The claimant provided a plausible explanation for her actions that appeared on the recording and for the informant's behavior. Benefits are allowed.

DECISION:

The representative's January 18, 2008 decision (reference 01) is affirmed. The employer has not met its proof to establish job-related misconduct. Benefits are allowed.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/css