

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

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**DEBORAH C MCDOWELL**

Claimant,

and

**BEATON INC**

Employer.

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**HEARING NUMBER: 10B-UI-11801**

**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: 96.5-2-A**

**DECISION**

**UNEMPLOYMENT BENEFITS ARE DENIED**

The employer appealed this case to the Employment Appeal Board. Two members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

**FINDINGS OF FACT:**

The claimant, Deborah C. McDowell, was employed by Beaton, Inc. (Burger King) from October 25, 2005 through August 23, 2010 as a full-time manager. (Tr. 2, 8) On July 16<sup>th</sup>, 2010, the claimant was arrested for a work-related matter that occurred on July 5<sup>th</sup> at the bank where the employer deposits its money. (Tr. 3, 4, 9) The police provided the employer with a videotape showing the claimant, while depositing the bank's money bag in the night depository, "...removing from the night drop a deposit that was put there by another of their customers..." (Tr. 4, 10) The bank discovered a deposit was missing and the tape revealed that the claimant was the next person after this deposit would have been made. (Tr. 11) The claimant said that the bank deposit bag she took belonged to her. (Tr. 10-11)

Michelle Peska (District Manager), who was a personal friend of the claimant, spoke with the claimant about this matter, which the claimant indicated she was innocent of the charge. (Tr. 6) Ms. Peska had a difficult time believing Ms. McDowell was guilty of theft. (Tr. 7) However, she placed Ms. McDowell on suspension that same day pending the resolution of the criminal matter. (Tr. 3, 4-5, 8)

When it became too difficult to run the restaurant without a full-time manager (Ms. McDowell), the employer reconsidered waiting for the outcome of the criminal matter and discharged the claimant so they could hire a new manager. (Tr. 6-7)

Ms. McDowell intended to enter a guilty plea at her order setting conference in order to obtain a "...deferred sentence on the second degree...that would be off [her] record in a year." (Tr. 10)

### **REASONING AND CONCLUSIONS OF LAW:**

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).

The record establishes that the claimant was arrested at work on July 16<sup>th</sup> for a work-related incident caught on video surveillance tape by the bank where the employer makes its bank deposits. Although the employer did not furnish the tape of which they were privy, the claimant's own testimony corroborated that the video showed her taking a deposit bag from the drop box and driving off. (Tr. 10-11) Her testimony that it was not another customer's deposit bag, but rather her own is simply not credible. First off, she was the next customer after the time frame in which the previous customer's deposit was missing, which she did not deny. (Tr. 11) Secondly, any reasonable person would find her assertion that she has a personal deposit bag questionable. Thirdly, Ms. McDowell equivocated as to whether it was actually someone else's bag as opposed to her own when her answer to the administrative law judge's questioning depended on who she was answering to (court or the administrative law judge). (Tr. 10) Thus, the claimant's very vague and contradictory answer further diminished her credibility. (Tr. 10) All these factors taken together make it more probable than not that the claimant did take the other customer's deposit bag and was guilty of theft.

The fact that the employer waited until several weeks later does not mitigate the currentness of the final act. The claimant was immediately suspended on July 16<sup>th</sup> once the employer had knowledge of the incident. (Tr. 3, 4, 6, 9-10, 11) Consequently, the claimant knew that her job was in jeopardy. The employer's decision to terminate her on August 23<sup>rd</sup> in order to hire a new manager rather than wait for the outcome of her criminal matter was not unreasonable. Based on this record, we conclude that the employer satisfied their burden of proof.

**DECISION:**

The administrative law judge's decision dated October 8, 2010 is **REVERSED**. The Employment Appeal Board concludes that the claimant was discharged for disqualifying misconduct. Accordingly, she is denied benefits until such time she has worked in and has been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. See, Iowa Code section 96.5(2)"a".

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Monique F. Kuester

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Elizabeth L. Seiser

