

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**STEPHANIE R ERSKIN**  
Claimant

**APPEAL NO: 08A-UI-03155-DT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**NELLIS MANAGEMENT COMPANY**  
Employer

**OC: 02/24/08 R: 02  
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

Nellis Management Company (employer) appealed a representative's March 21, 2008 decision (reference 01) that concluded Stephanie R. Erskin (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 15, 2008. The claimant participated in the hearing. April Rice appeared on the employer's behalf and presented testimony from one other witness, Sandy Carroll. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUE:**

Was the claimant discharged for work-connected misconduct?

**FINDINGS OF FACT:**

The claimant started working for the employer on February 20, 2007. She worked part time (approximately 30 hours per week) as a cashier in the employer's Des Moines, Iowa area Long John Silvers restaurant. Her last day of work was February 27, 2008. The employer discharged her on that date. The reason asserted for the discharge was too many cash drawer variances.

The claimant had been given an initial write-up on September 27, 2008 for a \$10.00 variance where a \$20.00 bill was found in the \$10.00 slot after the claimant had counted the drawer. On January 21, 2008 the claimant was given a second and final write-up for having a \$10.00 shortage when she forgot what the customer had paid her with and gave change for a \$20.00 instead of for a \$10.00.

On February 27 the claimant's drawer had a shortage of \$49.81. She had been working the drive through window over the lunch hour that day, which has a high business volume, typically \$350.00 to \$500.00 for the lunch period. The employer could not identify at what point the variance occurred, but asserted that the claimant was the only person who had access to the drawer. However, the claimant testified that there was someone else covering the drawer during time the claimant was on break, and that the manager on duty had herself made change

out of the drawer. Further, general protocol was for the drawer to be counted between the employee and the manager on duty; on February 27 the manager on duty counted the drawer without the claimant.

As a result of holding the claimant responsible for this third variance, the employer discharged the claimant.

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

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

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 focus of the definition of misconduct is on acts or omissions by a claimant that “rise to the level of being deliberate, intentional or culpable.” Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer’s interest, such as found in:
  - a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
  - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
  - a. Manifest equal culpability, wrongful intent or evil design; or
  - b. Show an intentional and substantial disregard of:
    1. The employer’s interest, or
    2. The employee’s duties and obligations to the employer.

Henry, supra.

The reason cited by the employer for discharging the claimant is the variance on February 27, 2008 after the prior incidents. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was responsible for the February 27 variance. Further, misconduct connotes volition, and there is no evidence the claimant intentionally acted with such disregard to her duties to cause the variance that day. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant’s actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

**DECISION:**

The representative’s March 21, 2008 decision (reference 01) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

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Lynette A. F. Donner  
Administrative Law Judge

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Decision Dated and Mailed

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