

**IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI**

**JACQUELINE J HECKART  
1331 S MAPLE APT F31  
SIOUX CITY IA 51106**

**BONGAARS SUPPLY INC  
323 WATER ST  
SIOUX CITY IA 51103-5020**

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**Appeal Number: NUNC PRO TUNC  
OC: 03-14-04 R: 01  
Claimant: Appellant (2)**

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4<sup>th</sup> Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Jacqueline J. Heckart appealed from an unemployment insurance decision dated April 5, 2004 reference 01 that held in effect that claimant was not eligible to receive unemployment insurance benefits and the employer's account would not be charged. The records indicated that claimant was discharged for misconduct in connection with her employment at Bongaars Supply, Inc. on March 12, 2004 because of dishonesty in connection with her work. A telephone conference hearing was scheduled and held on April 27, 2004 pursuant to due notice. Jacqueline J. Heckart participated and was represented by Richard Sturgeon. Pam Winebrianer, Human Resource Manager, represented the employer during the hearing and participated as a witness. William Behn, Store Manager; Mary Harman, Deli Manager; Jack Schramm, Assistant Manager; Sally Kloucep, Cashier; and Rose Couchman, Cashier; participated as witnesses on behalf of the employer.

Official notice was taken of the unemployment insurance decision dated April 5, 2004 reference 01, together with the pages attached thereto (3 pages in all). Claimant's Exhibit A consisting of 9 pages was admitted into evidence.

#### FINDINGS OF FACT:

The administrative law judge, having examined the entire record in this matter, finds that: Jacqueline J. Heckart (claimant) was employed with Bongaars Supply, Inc. on or about February 9, 2000. The claimant performed the job duties of a customer service cashier, sales clerk, and other assigned duties.

The claimant acknowledged receipt of a copy of Bongaars Supply's revised handbook and was aware of the provisions of the policy. During the tenure of the claimant's employment, she was never warned that her job was in jeopardy on any occasion in writing. The claimant held a conversation with Sue Bubb, Assistant Manager, during the summer or fall of 2003. The claimant had been dating a co-worker and was observed associating with him during business hours at various locations in the plant, including the deli provided by management for employee convenience and lunch breaks. The claimant was instructed to stay away from the co-worker during working hours, but she could have a lunch break with him in the deli. Subsequently, the claimant was observed by Bill Behn, Store Manager, in order to verify whether or not the claimant was performing her job duties in an acceptable manner or meeting with the co-worker in a manner which would not enable the claimant to perform her job duties. The claimant had been warned that she was not to work at the same place with the co-worker and not to meet him at locations in the facility other than at the deli for lunch.

The conduct of William Behn, Store Manager, in observing the claimant would be justified under the circumstances and did not constitute harassment of the claimant.

On or about March 10, 2004, the claimant purchased certain items from the facility and had the sales accounted for at a cash register before leaving the facility or going on break. When an employee purchases an item and goes through the cash register it is registered on the computer and shows the item that was purchased and whether or not it was paid for. A receipt is given to the employee purchasing an item for personal use. Employee discounts are allowed and are recorded.

On March 10, 2004, the claimant was observed by William Behn, Store Manager, when she picked up a package of Fritos from the shelf. The claimant then left the area and apparently moved to the break room. William Behn then checked with the cashiers that were on duty and was informed that no one had checked out a package of Fritos to the claimant or to anyone else on that date.

The claimant moved to the deli and sat down while she was eating from the Fritos package. William Behn sent other personnel to observe the claimant eating the Fritos but they did not at any time ask the claimant if she had a receipt which disclosed that she had paid for the Fritos. The claimant's testimony is believable and established that she had received a receipt because she had paid for the Fritos with nickels in cash and did not receive a discount. On March 11, 2003 the claimant reported to work at 9:50 and worked until approximately 11:00. The claimant was then called to the office of William Behn, Store Manager. Pam Winebrianer, Human Resource Manager, was also present. The claimant was accused of stealing the package of

Fritos and not going by a cash register to pay for them in any fashion. The claimant denied taking the Fritos but did not have a receipt with her.

A detailed investigation was made with respect to the issue whether or not the claimant paid for the Fritos. The testimony of Rose Couchman, Cashier, while vague with respect to dates and times, did indicate that she had received nickels for an item purchased by the claimant but was busy and possibly unable to ring it up in the usual fashion. The claimant was requested to return to the office with a cashier's receipt and did so on March 15, 2004. The claimant could not locate a receipt and the employer could not find any evidence of the fact that the claimant paid for the Fritos on the day in question. The claimant was then informed that she did not need to return to work and was in effect discharged. The claimant was actually suspended when sent home on March 12, 2004 and discharged on March 15, 2004.

#### REASONING AND CONCLUSIONS OF LAW:

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

871 IAC 24.32(4) provides:

(4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

871 IAC 24.32(9) provides:

(9) Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

The evidence in the record establishes that the employer made a reasonable effort to investigate and determine whether or not the claimant allegedly stole a package of Fritos on March 10, 2004.

During the tenure of the claimant's employment she had never been warned that her job was in jeopardy for any reason relative to the termination of her employment. While the claimant had been warned not to associate with a co-worker that she was dating while on the job, such warning occurred in 2003 and was not a current act of misconduct. The claimant had been observed by the store manager for a lengthy period of time to see if she was complying with the direction she was given concerning association with a co-worker and no evidence was presented where she ever violated the direction of management following the initial warning. The record in this matter does not establish that the claimant conducted herself in a manner which would evince willful or wanton disregard of an employer's interest or a disregard of the standard of behavior which the employer had the right to expect of the claimant. An inadvertence or ordinary negligence in an isolated instance or a good faith error in judgment or discretion are not deemed misconduct. The claimant reasonably explained that she had paid for the Fritos with nickels at the cashier counter and did receive a receipt which she kept in her hand for a period of time. The claimant was observed eating the Fritos but no one ever approached her and asked if she had a receipt from the cashier on the day in question. All that was established was that the claimant was seen removing the Fritos from the shelf and eating the Fritos at the deli. None of the cashier's remembered the claimant paying for the Fritos except Rose Couchman who was not certain when she sold the Fritos to the claimant and was paid with a handful of nickels.

The administrative law judge concludes that the claimant did not commit a deliberate act or omission which would constitute a material breach of her duties and obligations arising out of her contract of employment. Theft of company property has not been established. The administrative law judge concludes that Jacqueline J. Heckart was discharged from her employment with Bongaars Supply, Inc. on March 15, 2004. The discharge on March 15, 2004 would relate back to the date of her suspension on March 12, 2004.

DECISION:

The decision of the representative dated April 5, 2004, reference 01, is reversed. Jacqueline J. Heckart was discharged from her employment with Bongaars Supply, Inc. on or about March 12, 2004 for no disqualifiable reason and unemployment insurance benefits are allowed provided the claimant is otherwise eligible under the provisions of the Iowa Employment Security Law.

sb/b/b