

**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**

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**ORTMAN INVESTMENT CORPORATION
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**Appeal Number: 05A-UI-04367-H2T
OC: 03-27-05 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, 4th 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.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the April 15, 2005, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on June 22, 2005. The claimant did participate and was represented by Michael Tullis, Attorney at Law. The employer did participate through Chaz Ortman, Owner.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a cashier/clerk/stocker full time beginning March 1, 2003 through March 28, 2005 when she was discharged. The claimant worked as a cashier and on March 25, 2005 the register she was working was \$80.00 short for the lottery ticket sales and

the cash register was short \$260.00. Mr. Ortman asked the claimant why the register was short and why lottery ticket sales were off. The claimant had no explanation to offer Mr. Ortman. She could not explain why the register was short. The claimant was not the only person to operate the cash register that day. Curtis, Tina and Deb all worked that day with the claimant and had access to the claimant's cash register. Mr. Ortman said to the claimant, "Nancy, if you were me, what would you do?" The claimant said, "I guess I would fire me." The claimant then got up and walked out of the store, believing that Mr. Ortman was discharging her. When she stood up and walked out, Mr. Ortman said nothing to her. He did not call her back or tell her she was not being discharged. Another employee, Tina, was already in the store to work the claimant's shift when she arrived on March 28, 2005.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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).

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). The employer discharged the claimant and has the burden of proof to show misconduct. Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. Miller v. Employment Appeal Board, 423 N.W.2d 211 (Iowa App. 1988).

Mr. Ortman led the claimant to believe she was being discharged by failing to call her back and tell her otherwise when she said to him, "I guess I would fire me." It was clearly reasonable for the claimant to believe that she was being discharged when Mr. Ortman remained silent. Additionally, Mr. Ortman had already arranged for another employee, Tina, to cover the claimant's work shift. His action of getting another employee in the store to work for the claimant even prior to the claimant's arrival is evidence of his state of mind that the claimant's employment was going to be ended. The administrative law judge concludes the claimant was discharged; she did not voluntarily quit.

The employer's evidence does not establish that the claimant deliberately and intentionally acted in a manner she knew to be contrary to the employer's interests or standards. There was no wanton or willful disregard of the employer's standards. In short, substantial misconduct has not been established by the evidence. While the employer may have had good cause to discharge, conduct which might warrant a discharge from employment will not necessarily sustain a disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa App. 1983). The employer cannot dispute the fact that up to three other employees had access to the claimant's cash drawer on March 25, 2005. There is no proof at all that the claimant was responsible for the cash or lottery ticket shortage.

The employer made much of the fact that the claimant had previously borrowed money from him. The administrative law judge concludes that the claimant was willing to borrow money from the employer, not steal from him when she was short cash. Misconduct has not been established, benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The April 15, 2005, reference 01, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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