

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SHANNON L JULICH
Claimant

APPEAL NO. 07A-UI-10786-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**JEENS INC
MCDONALDS**
Employer

**OC: 10-28-07 R: 01
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the November 16, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on December 10, 2007. The claimant did participate. The employer did participate through Alex Walker, Area Supervisor and Steve Leonard, President. Employer's Exhibit One was received.

ISSUE:

Was the claimant discharged for work-related misconduct?

FINDINGS OF FACT:

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: Claimant was employed as a shift manager full time beginning March 30, 2006 through October 16, 2007 when she was discharged.

The claimant was discharged for refusal to follow the instructions of her Supervisor Jennifer Hall. The claimant was conducting a transaction for a customer who had skipped the first drive-through window where he was to pay for his purchase. The claimant was taking the customer's money to the first drive through window to use the cash drawer there when Ms. Hall told her to use the cash drawer by the second drive through window for the transaction. The claimant did not want to use that cash drawer because it had already been used by three other employees and another manager. On a previous occasion the claimant had been disciplined for sharing a cash drawer with other employees when \$100.00 came up missing at the end of a shift.

The claimant explained to Ms. Hall that she would not use a cash drawer that was not authorized to her, but Ms. Hall did not listen to her and instead just conducted the transaction herself. Ms. Hall called Mr. Walker after the incident and together they determined that the claimant should be discharged for insubordination for her failure to use the cash drawer Ms. Hall indicated. The employer admitted that if there had been a shortage in the drawer that Ms. Hall wanted the claimant to use, then the claimant could have been held responsible for that shortage.

The claimant did have a history of previous discipline for among other things, insubordination, refusal to perform tasks assigned by Ms. Hall, making derogatory comments about Ms. Hall, using profanity in the work place, filling out the 'red-book' for another manager, failure to perform safe counts and for refusing to work her assigned position.

On October 11 the claimant also asked for and received permission to switch places with another coworker. There was no rule against coworkers switching positions and Ms. Hall approved the switch the claimant asked for.

REASONING AND CONCLUSIONS OF LAW:

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

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 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 issue is not whether the employer made a correct decision in separating claimant, 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 misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425

N.W.2d 679 (Iowa App. 1988). 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).

The question of whether the refusal to perform a specific task constitutes misconduct must be determined by evaluating both the reasonableness of the employer's request in light of all circumstances and the employee's reason for noncompliance. *Endicott v. IDJS*, 367 N.W.2d 300 (Iowa App. 1985).

The claimant had been previously disciplined for using a cash drawer when a shortage was discovered. Under the circumstances, the administrative law judge concludes it was reasonable for the claimant to refuse to use the drawer assigned by Ms. Hall when she could have been held accountable for a shortage that was not her own doing. The claimant was completing the tasks, that is she was handling the customer's transaction, but she was doing it in a way Ms. Hall did not like. The claimant's refusal to violate the cash drawer policy was reasonable under the circumstances in light of her previous discipline.

The administrative law judge concludes that on October 11 the claimant sought and received permission to switch positions with another coworker. Her switching was a common practice and was done with the approval of her Supervisor. For the employer to find that she refused to perform her assigned position is not supported by the complete facts.

Additionally, there is no clear evidence to support the employer's contention that the claimant was to do safe counts on October 11 and refused to do so. The claimant's testimony that only a particular manager was to do the safe counts and she was not that person on October 11 is persuasive. The claimant did not fail to perform safe counts on October 11.

Lastly, the administrative law judge is persuaded that the claimant was completing the 'red-book' for many managers including taking it home and working on it during her own time. The employer knew and encouraged this as it made the store look good when they were evaluated by corporate. There is no evidence to support a conclusion that the claimant was filling out the 'red-book' on October 11 in a manner she should not have been.

The fact that another employee chose to leave his employment when the claimant was discharged is not her misconduct and cannot be considered against her. The employer's decision to discharge the claimant was made long before the other employee walked out when the claimant was terminated.

An employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation.

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). Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The November 16, 2007, reference 01, decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/pjs