

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DESTINY K TOP
Claimant

APPEAL NO. 09A-UI-01524-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MCDONALD'S
Employer

OC: 12/21/08 R: 01
Claimant: Respondent (1)

Section 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

McDonald's filed an appeal from a representative's decision dated January 21, 2009, reference 01, which held that no disqualification would be imposed regarding Destiny Top's separation from employment. After due notice was issued, a hearing was held by telephone on February 19, 2009. Ms. Top participated personally. The employer participated by Pam Deets, Accountant; Scott Green, Director of Operations; and Toni Delfs, General Manager. Exhibits One through Four were admitted on the employer's behalf.

ISSUE:

At issue in this matter is whether Ms. Top was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all of the evidence in the record, the administrative law judge finds: Ms. Top began working for McDonald's on December 1, 2007 and was last employed as a shift manager. She worked 30 to 40 hours each week. The restaurant was short-staffed on December 22, 2008 and Ms. Top assigned various individuals to work stations. The general manager, Toni Delfs, changed the work locations but did not confer with Ms. Top before doing so. When Ms. Top told the individuals to return to the stations she assigned, Ms. Delfs became upset. She raised her voice and told Ms. Top that if she did not want to do her job right, she should leave. The statement was made at the front counter in front of customers and other crew members.

Ms. Top left the restaurant and called Scott Green, Director of Operations, to explain what had occurred. She indicated she no longer wanted to work with Ms. Delfs. Mr. Green indicated he would discuss the situation with Ms. Delfs. Ms. Top called the restaurant on December 23 to inquire about returning to the job. She left a message for Ms. Delfs but did not receive a return call. The employer had received prior complaints from other employees about Ms. Delfs being short with them.

Ms. Top has missed a good deal of work for various reasons. She was warned on May 27, 2009 that, if dependability continued to be an issue, she would be removed from management. Although she was absent or late a number of times thereafter, she was still in management at the time of separation.

REASONING AND CONCLUSIONS OF LAW:

The parties disagree as to whether Ms. Top quit or was discharged. A quit is a separation initiated by the employee whereas a discharge is a separation initiated by the employer. Although Ms. Top left work before the end of her shift on December 22, she did not walk off the job with the intention quitting. She left the restaurant when she did because the manager was raising her voice and chastising her in the presence of customers and other employees. The fact that Ms. Top called the operations manager that same day in an attempt to resolve the issue with Ms. Delfs is indicative of an intent to remain in the employment. Ms. Top never heard back from the operations manager or the general manager about returning to work after December 22. Since the employer never called her back to indicate the problem had been resolved and that she could return, the separation was initiated by the employer.

An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Codes section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Having taken the position that Ms. Top quit, the employer did not allege misconduct. However, the employer did offer exhibits concerning her attendance. The final attendance infraction prior to the separation was on December 21 when she failed to give three hour's notice that she would be absent. In spite of the late call and prior absences, the employer did not discharge Ms. Top upon her return to work on December 22. Because she had not been discharged in spite of her poor attendance record, the administrative law judge must conclude that the employer did not feel her attendance warranted discharge as of December 22. Moreover, the employer had advised her in prior warnings that she would be removed from management, not discharged, if she continued to have attendance issues. It was not until December 21 that she was told discharge would occur if there were further issues.

After considering all of the evidence, it is concluded that disqualifying misconduct has not been established. While the employer may have had good cause to discharge, conduct that might warrant a discharge from employment will not necessarily support a disqualification from job insurance benefits. As such, benefits are allowed.

DECISION:

The representative's decision dated January 21, 2009, reference 01, is hereby affirmed. Ms. Top was discharged but misconduct has not been established. Benefits are allowed, provided she satisfies all other conditions of eligibility.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/pjs