IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

KRISTA WILSON
Claimant

KWIK TRIP INC
Employer

APPEAL NO. 11A-UI-03833-BT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/27/11
Claimant: Respondent (1)

Iowa Code § 96.5(2)(a) - Discharge for Misconduct

STATEMENT OF THE CASE:

Kwik Trip, Inc. (employer) appealed an unemployment insurance decision dated March 23, 2011, reference 01, which held that Krista Wilson (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 19, 2011. The claimant participated in the hearing. The employer participated through Kathy Heeren, store leader. 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:

The issue is whether the employer discharged the claimant for work-related misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was employed as a part-time cashier/cook from July 2, 2009, through February 22, 2011, when she was discharged for three failed identification (ID) checks. Tobacco cannot be sold to anyone under the age of 18 and the employer requires employees to ask for identification for everyone who is under the age of 30. The employer's policy provides that the first failure to check ID results in three days of suspension and retraining. The second policy failure results in five suspended days and retraining. If there is a third policy violation within a 24-month period, the employee is discharged.

The claimant failed to check for ID on March 17, 2010 and was suspended for three days but was not retrained. She failed to check ID again on August 10, 2010 and was suspended five days but was not retrained. The final incident occurred on February 8, 2011, when she did not ask for ID from the 22 year-old customer. The employer used the same 22-year-old person to see if its employees were conducting ID checks and the employees are never advised at the time that they failed to check the person's ID.

The claimant made a judgment call and did not ask for the customer's ID on February 8, 2011. She may have recognized the fact that she sold cigarettes to this person before, which could

have influenced that judgment call. Store Leader Kathy Heeren testified that she can tell when a person is under the age of 30 and refused to acknowledge there is no definitive way to know a person's age.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. 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.

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 claimant was discharged on February 22, 2011 for failing three identification checks. Tobacco cannot be sold to minors and the employer requires employees to ask for identification for everyone who is under the age of 30. Although the store leader testified she can tell when someone is under the age of 30, she may be the only one in the human race that has that ability and for the rest of the human race, it is a judgment call. The claimant made a judgment call in the final incident and while she was not selling tobacco to a minor, she did fail to ask for identification since the customer was only 22. However, a judgment call is not equivalent to intentional wrongdoing. Misconduct must be substantial in nature to support a disqualification from unemployment benefits. *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1982). The focus is on deliberate, intentional, or culpable acts by the employee. *Id.* Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are allowed.

DECISION:

The unemployment insurance decision dated March 23, 2011, reference 01, is affirmed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

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Susan D. Ackerman
Administrative Law Judge

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Decision Dated and Mailed

sda/kjw