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

ROBERT E CUMMINGS
314 – 4TH AVE APT #3
CORALVILLE IA 52441

MCDONALDS OF CORALVILLE
618 – 1ST AVE
CORALVILLE IA 52241

Appeal Number: 05A-UI-01051-RT
OC: 12-26-04 R: 03
Claimant: Respondent (1)

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 for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, McDonalds of Coralville, filed a timely appeal from an unemployment insurance decision dated January 21, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Robert E. Cummings. After due notice was issued, a telephone hearing was held on February 15, 2005, with the claimant participating. Kris Fox, Store Manager at the employer's location in Coralville, Iowa, and Marvin Davis, Swing Manager at the same store, participated in the hearing for the employer. The administrative law judge attempted to reach Crystle Eldon to testify for the employer but was unable to reach her. Cris Woodhouse may have been available to testify for the employer but was not called because his testimony would

have been repetitive and unnecessary. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a part-time/full-time crew person or front counter cashier from October 13, 2004 until he was discharged on December 19, 2004. The claimant averaged between 32 and 40 hours per week. The claimant was discharged for an incident occurring on or about December 18, 2004 between the claimant and a co-worker. The employer alleged that the claimant had a confrontation with a co-worker and threatened to shoot the co-worker when the claimant saw her out. However, the claimant made no such threat. During that incident the co-worker came into the employer's restaurant with her mother and then had some words with the claimant. Both the claimant and the co-worker were equally at fault and both displayed an "attitude." The co-worker and her mother came into the employer's restaurant to order food. The claimant asked them if he could help them. The co-worker became belligerent and said, "Does it look like I need help?" The claimant then decided that the co-worker did not need help and went into the back to wash trays. The co-worker and her mother then complained to Marvin Davis, Swing Manager and one of the employer's witnesses. The two left and reported the claimant's alleged behavior to Human Resources and then returned and apparently had an additional confrontation but at that time the claimant was only acting in a joking manner. The claimant did not make any threats. The next day, on or about December 19, 2004, a person from the headquarters of Human Resources Office came to the store and talked to the claimant. The claimant denied the threats. The claimant was told that he would be called by the store manager, Kris Fox, Store Manager at the employer's location in Coralville, Iowa, and the employer's other witness. Ms. Fox then called the claimant later on December 19, 2004 and informed the claimant that he had been discharged.

On November 13, 2004, the claimant received an oral warning for being more cooperative with other co-workers. The claimant appeared to be having conflicts with other co-workers and they had complained that the claimant was not helping them. Whether the claimant received any other warnings is uncertain. Pursuant to his claim for unemployment insurance benefits filed effective December 26, 2004, the claimant has received unemployment insurance benefits in the amount of $800.00 as follows: $100.00 per week for eight weeks from benefit week ending December 25, 2004 to benefit week ending February 12, 2005.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.

2. Whether the claimant is overpaid unemployment insurance benefits. He is not.

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 parties agree, and the administrative law judge concludes, that the claimant was discharged on December 19, 2004. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer's witness, Kris Fox, Store Manager at the employer's location in Coralville, Iowa, testified purely from hearsay that the claimant threatened a co-worker stating that if he saw the co-worker out, he would shoot her. The claimant denied making this statement and his denial was confirmed by the employer's witness, Marvin Davis, Swing Manager, who was present when the claimant was alleged to have made the statement. The claimant testified that he went to help serve a co-worker who entered the employer's restaurant with her mother on or about December 18, 2004 and asked if he could help them. The co-worker got belligerent and asked the claimant if it looked like she needed help. The claimant decided that the co-worker did not need help and went in the back to wash trays. The co-worker then complained to Mr. Davis and then left and complained to Human Resources and then returned where apparently another confrontation occurred but the claimant made no threats.

Mr. Davis, who was present at all material times, did not hear any threats made by the claimant and testified that the claimant was acting in a joking manner. Mr. Davis did say that both the claimant and the co-worker appeared to have an "attitude." Mr. Davis indicated that both were at fault for the confrontation. Because the testimony of Ms. Fox to the contrary is hearsay, the

administrative law judge must conclude that the claimant made no such threats and was acting in a joking manner and although he had an "attitude" so did the co-worker and both were equally at fault. On the record here, the administrative law judge is constrained to conclude that the employer has not demonstrated by a preponderance of the evidence any behavior on the part of the claimant that would be a deliberate act or omission constituting a material breach of his duties and/or would evince a willful or wanton disregard of the employer's interest and/or would be carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. On the record here, the claimant's behavior may have been ordinary negligence in an isolated instance but that is not disqualifying misconduct. There was some question as to whether the claimant received an oral warning for working with his co-workers but the administrative law judge does conclude that the claimant did receive such an oral warning on or about November 13, 2004. Ms. Fox testified that she gave an oral warning to the claimant but could not remember the date. The claimant at first denied any kind of oral warning but conceded that he was told by Ms. Fox that he needed to help his other co-workers. The administrative law judge concludes that the claimant did receive an oral warning on this occasion. Ms. Fox testified that the claimant received seven other oral warnings from a swing manager, Crystle Eldon. However, Ms. Eldon was not available to testify and the claimant denied any such warnings and the administrative law judge concludes that there is not a preponderance of the evidence of seven such warnings. Surely, if the claimant was deserving of seven oral warnings, at least some of them would have been in writing and the claimant would have been discharged prior to the seven oral warnings.

In summary, and for all of the reasons set out above, the administrative law judge concludes that there is not a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct and, as a consequence, he is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits, and misconduct to support a disqualification from unemployment insurance benefits must be substantial, including the evidence therefore. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant his disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided he is otherwise eligible.

Iowa Code section 96.3-7 provides:

> 7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.
>
> If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of $800.00 since separating from the employer herein on or about December 19, 2004 and filing for such benefits effective December 26, 2004. The

administrative law judge concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of January 21, 2005, reference 01, is affirmed. The claimant, Robert E. Cummings, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was discharged but not for disqualifying misconduct. As a result of this decision the claimant is not overpaid any unemployment insurance benefits arising out of his separation from the employer herein.

pjs/tjc