

BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

MARY E WOLVERTON

Claimant,

and

FLYING J INC

Employer.

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HEARING NUMBER: 10B-UI-16847

EMPLOYMENT APPEAL BOARD
DECISION

NOTICE

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT IS FILED WITHIN 30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-2A

DECISION

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The Employment Appeal Board would adopt and incorporate as its own the administrative law judge's Findings of Fact with the following additions:

The employer's personnel handbook does not indicate how many cash shortages in a given timeframe would result in termination. Each store develops its own criteria, i.e., three cash shortages within a 90-day period results in termination. (Tr. 4)

Employees were required to verify the cash in each's drawer by taking out the cash and counting it by weighing it on a particular scale both before and after each person's shift. . (Tr. 6, 14) Each time the

claimant's drawer was over, she notified the manager pursuant to protocol. (Tr. 6)

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On September 18th, 2009 (Tr. 7), the claimant started her shift and noted that there were "... over 1300 drawers (a. s.) (dollars) in [the bottom of her] drawer from second shift..." (Tr. 6, 10-11, 11) that had not yet been counted (weighed) or deposited. (Tr. 9) The shift manager explained that was why there was no money in the safe. (Tr. 6, 11) The claimant was responsible for counting (weighing) this money as well as her own money before and after her shift, which she did. (Tr. 8-9, 10) She did not know if the previous shift had a discrepancy in their count. (Tr. 11) Ms. Wolverton ended up being responsible for being over in her drawer based on the inclusion of both shift's money, i.e., a cash handling issue. (Tr. 11) The employer never saw the claimant take money from her drawer at any time. (Tr. 4)

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2009) provides:

Discharge for Misconduct. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:

The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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 Iowa Supreme court has accepted this definition as reflecting the intent of the legislature. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665, (Iowa 2000) (quoting Reigelsberger v. Employment Appeal Board, 500 N.W.2d 64, 66 (Iowa 1993)).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An

employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 NW2d 661 (Iowa 2000).

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The record establishes that the employer had a method of counting money by some vague system of weighing the money. The claimant's failure to have the correct weight at the end of her shift on three occasions resulted in her termination, which was in keeping with the employer's policy. However, the employer provided no documentation or witnesses who saw Ms. Wolverton take money from the drawer on any of the three occasions for which she was written up. In fact, the employer admitted that this policy (three discrepancies within a 90-day period) was unwritten and we can reasonably infer that Ms. Wolverton did not know that her job was in jeopardy.

Even though the employer testified that the claimant had no explanation for her discrepancies, the claimant articulated that, at least, one of the problematic counts was due, in part, to a mistake in cash handling that carried over from a previous shift. But the employer did not consider that discrepancy (\$1300 left from prior shift) as a mitigating factor. Rather, the fact that she ended up with \$20 over was directly attributed to her. The claimant's failure to provide an explanation for that final incident (shortage of \$25) is not probative that she took the money, or that she acted with intentional disregard of the employer's interests. While the employer may have compelling business reasons to terminate the claimant, conduct that 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 burden of proof is with the employer; and in light of the vague proof the employer put forward, we conclude that the employer has failed to satisfy that burden.

DECISION:

The administrative law judge's decision dated December 18, 2009 is **REVERSED**. The claimant was discharged for no disqualifying reason. Accordingly, she is allowed benefits provided she is otherwise eligible.

John A. Peno

Elizabeth L. Seiser

AMG/ss

DISSENTING OPINION OF MONIQUE F. KUESTER:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

Monique F. Kuester

AMG/ss