IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MARY F DAVIS
Claimant

B R STORES INC
SUPER SAVER/ALPS
Employer

APPEAL NO. 09A-UI-11031-LT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/05/09
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 29, 2009, reference 01, decision that allowed benefits. After due notice was issued, a telephone conference hearing was held on August 18, 2009. Claimant participated. Employer participated through David Herrick and Donna Bristol, Human Resources Director who did not testify but acted as representative. Employer's Exhibits One through Six were admitted to the record.

ISSUE:

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of benefits.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant most recently worked full-time as a cashier from July 24, 2006 and was separated on June 29, 2009. Her last day of work was June 28. She was discharged after her fourth cash drawer discrepancy of $10.00 or more in the past six months. On June 26 her drawer was $19.68 short. Others discrepancies happened on May 31, 2009 $10 over; May 25, 2009 $10 short; and January 22, 2009 $20.19 over. Employer warned her on May 31, 2009 and suspended her for three days. The frequency of errors began to increase in January 2009 after she had recuperated from major surgery and she believes she may have returned to work prematurely and her diabetes affected her thinking process. Three weeks before the separation she told Herrick she was not feeling well because of bladder problems but went to work while ill anyway because of enforced attendance. Her request for a transfer to demonstrations was denied. While working at Alps, another parent company store, before transferring on August 6, 2007, she was blamed for another employee taking money out of the drawers but the error was discovered sometime later. She received training at the other store about counting and tips and techniques to try when she had problems but had never approached the point of termination. The other store was less than half the size and had different check handling procedures. At Super Saver she had one day of training with no retraining on June 15, 2009 except being told to recount four times. She earnestly tried all suggestions, shuffled and crinkled bills to make

sure they did not stick, tried everything she could to address problems, and made her best effort.

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).

In an at-will employment environment 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. From the history, or lack thereof, before and after January 2009 it is apparent that claimant had some ongoing medical issues that affected her ability to accurately perform her job duties but she did not feel she was able to take time off to resolve those because of the strict attendance policy. Thus, the administrative law judge (ALJ) concludes she did perform her job to the best of her ability and she was not negligent or careless in the performance of her work, but had a period of time when she was not able to accurately keep up with the volume of work during this limited time frame. Whether a break from cashiering to conduct demonstrations or more time off or allowance of unpenalized sick days would have made a difference is unclear; however, employer has not established that claimant was either deliberate or negligent in the performance of her job duties. Benefits are allowed.

DECISION:

The July 29, 2009, reference 01, decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/pjs