

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JANA M WOODLEY
Claimant

KWIK TRIP INC
Employer

APPEAL NO: 11A-UI-02398-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 01/16/11
Claimant: Appellant (2)

Section 96.5-2-a – Discharge
871 IAC 24.32(1) – Definition of Misconduct
871 IAC 24.32(8) – Current Act

STATEMENT OF THE CASE:

The claimant appealed a department decision dated February 22, 2011, reference 01, that held she was discharged for misconduct on January 18, 2011, and benefits are denied. A telephone hearing was held on March 24, 2011. The claimant participated. Steve Tupy, Store Leader, and Brett Gooden, Loss Prevention Manager, participated for the employer. Employer Exhibit 1 was received as evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with employment.

FINDINGS OF FACT:

The administrative law judge having heard the testimony of the witnesses, and having considered the evidence in the record, finds: The claimant began employment on July 26, 2010, and last worked for the employer as a full-time guest service co-worker on January 18, 2011. The claimant received the employer policies. Theft of company property (taking merchandise without paying for it) is grounds for employment termination.

The store manager and an assistant watched a security video on December 30 to check on over-night employees. The claimant was observed eating a Tornado (hot dog sandwich) during a period from 3:01 a.m. to about 3:08 a.m. on her December 26/27 work shift. The video did not show claimant having a co-worker taking payment or claimant paying for the Tornado. When the employer checked store data, it did not show any payment received for a Tornado during the period shown by the video.

The store leader forwarded the evidence to Loss prevention. The employer allowed claimant to continue her work thru January 17. On January 18, 2011, the store leader and loss prevention representative met with claimant, and questioned her about the incident. Claimant stated she might have forgotten to pay for the food item, but she could not recall given the time lapse from when it occurred.

REASONING AND CONCLUSIONS OF LAW:

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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The administrative law judge concludes the employer has failed to establish claimant was discharged for a current act of misconduct in connection with employment on January 18, 2011, for theft of company property.

The employer had evidence on December 30 that claimant failed to pay for a food item on December 27. It waited 19-days to discharge claimant for an incident that occurred three days before it acquired knowledge, and it allowed claimant to continue her work during the interim. The delay makes the incident not a current act of misconduct. Understandably, the claimant could not recall what happened on the date at issue and the employer did not allow her to see the video in an attempt to refresh her recollection.

DECISION:

The department decision dated February 22, 2011, reference 01, is reversed. The claimant was not discharged for a current act of misconduct on January 18, 2011. Benefits are allowed, provided the claimant is otherwise eligible.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/pjs