

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

JESSICA WESSELS  
2004 VIRGIL ST  
CEDAR FALLS IA 50613

JIVA LIFESTYLE SALON AND SPA INC  
223 MAIN ST  
CEDAR FALLS IA 50613-2735

Appeal Number: 05A-UI-03543-D  
OC: 02/20/05 R: 03  
Claimant: Appellant (2)

**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, 4<sup>th</sup> 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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Jessica Wessels (claimant) appealed a representative's March 25, 2005 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment with Jiva Lifestyle Salon and Spa, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, an in-person hearing was held on May 26, 2005. The claimant participated in the hearing. Stephanie Bardal appeared on the employer's behalf and presented testimony from one other witness, Tina Gage. During the hearing, Employer's Exhibits One through Three and Claimant's Exhibits A and B were entered into evidence. 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:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

After working under the prior ownership of the salon from October 15, 2002 through November 18, 2004, the claimant has hired to work at the salon under the new ownership on November 18, 2004. She worked full time as a stylist; under the prior owner, she had been salon manager. Her last day of work was February 17, 2005. The employer discharged her on that date. The reason asserted for the discharge was violating the employer's policies after prior warning.

The claimant had been verbally advised in approximately December to be more cautious regarding the coverage of her apparel, and she did act to address that concern. On February 1, 2005, she was given a written warning because of an incident on January 13, 2005; the employer believed she had received a pedicure from another employee without getting prior approval and without paying, as required by the employer's policies. The claimant had viewed it as a foot rub being offered as a favor by a friend while they were both unoccupied. The employer's water basin and lotion were used, but the claimant did not have any trimming or other work done on her feet. Upon learning of the employer's concern, the claimant offered to pay the cost of a pedicure, but the employer declined.

The employer's purchase of the business had been problematic, and the employer had set out its transition expectations that "due to the nature of the sale, we will no longer accept expired gift cards. If the expiration date of a presented gift card is within 10 days, please see Stephanie or Tina and an exception may be made, at their discretion." On February 15, 2005, a customer came into the salon. Since the front desk person was out of town, and the claimant was the only stylist free, the claimant went to the desk to wait on the customer. The customer had a gift card; it is unknown whether the card had expired or not. The value on the card was \$30.00, and the customer wanted to add \$45.00 to the card so it had a \$75.00 balance. The customer named Ms. Bardal, the new owner, by name, and said he had spoken to her and she had said it would be fine. The claimant accepted the customer's money and proceeded to update the card and add on the additional money by using the front desk person's password.

Upon learning of the claimant's action, the employer determined to discharge her.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right to terminate the claimant's employment, 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 is misconduct that warrants denial of unemployment insurance benefits are two separate questions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

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. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982).

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 focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
  - a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
  - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
  - a. Manifest equal culpability, wrongful intent or evil design; or
  - b. Show an intentional and substantial disregard of:
    1. The employer's interest, or
    2. The employee's duties and obligations to the employer.

Henry, supra. The reason cited by the employer for discharging the claimant is her violation of various procedures, most recently the question about the gift card. The situation was different from someone trying to simply use an expired card, and the claimant accepted that the customer had gotten Ms. Bardal's approval. Under the circumstances of this case, the claimant's actions were the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence, and was a good faith error in judgment or discretion. The employer had concluded, possibly correctly, that it was too difficult for the claimant to adjust from the role of being salon manager to a stylist, which is a good business reason for the discharge, but it is not misconduct. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's March 25, 2005 decision (reference 01) is reversed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

ld/sc