

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

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HARDEES FOOD SYSTEMS INC  
c/o FRICK UC EXPRESS  
PO BOX 283  
ST LOUIS MO 63166-0283

Appeal Number: 04A-UI-08627-H2T  
OC: 07-11-04 R: 04  
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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 28, 2004, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on August 31, 2004. The claimant did participate. The employer did participate through Chris Hampton, District Manager.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a General Manager full time beginning August 21, 2003 through March 4, 2004, when she was discharged.

The claimant was employed as the General Manager of the Fort Madison store until approximately one week prior to her discharge. The claimant voluntarily agreed to be transferred to the Burlington

store when the Keokuk store closed and there was a shifting around of a number of general managers among the company stores. While the claimant was the general manager of the Fort Madison store she would let the smokers who worked for her split up their one-half hour break so that during a seven, eight or nine hour shift an employee could take more than one opportunity to go outside and smoke a cigarette.

During the claimant's first week on the job at the new store in Burlington, one of the shift managers, Dana, worked with the claimant for three days. During each of the three days that she worked with the claimant, Dana went outside numerous times for cigarette breaks. The claimant assumed that Dana was punching herself out as she was clearly taking breaks and as a shift manager Dana knew how to punch herself out on the manager's computer or any other cash register/computer. As a shift manager, Dana knew or should have known that she was not paid to take cigarette breaks. When doing the payroll on Monday evening March 1, 2004 the claimant noticed that Dana had accumulated overtime hours. She checked Dana's payroll records and discovered that throughout the entire week she had worked, Dana had not once clocked herself out on break even though she had gone outside the store on many occasions to take cigarette breaks. It was the claimant's responsibility to enforce the employer's policies requiring employees punch out for breaks if they were going to go outside and smoke cigarettes. Dana clearly took breaks during the three shifts she worked with the claimant during the week. The claimant altered Dana's time card, as was her right, and left the card for Dana to initial when she next worked. On Wednesday when the claimant saw Dana and tried to talk to her about the time card changes, Dana would not speak to her. The employer admits that Dana was not to be paid to go outside and take cigarette breaks. The employer cannot remember what, if any, alterations were made to any other employee's time cards. When Dana complained to Mr. Hampton he spoke to the claimant and discharged her for falsifying company documents. The claimant explained to Mr. Hampton that Dana had taken breaks, but Mr. Hampton, for some reason, chose not to believe her. The claimant properly noted her changes to Dana's time card on the log sheet as was required of her. The claimant had no prior discipline of any kind.

#### REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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 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 employer discharged the claimant and has the burden of proof to show misconduct. 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).

The claimant offers the more credible evidence that Dana did in fact take her breaks during all three of the shifts she worked with the claimant. Dana failed to punch out during her breaks and it was the claimant's responsibility to change her time card to accurately reflect the time Dana worked in order to protect the employer from paying wages where they had not been earned. It was common practice for the managers to change the time cards and then later have the effected employees sign or initial them. Dana would not even speak to the claimant when the claimant, as the general manager, tried to address the issue with her. The claimant was acting properly to safeguard the employer's interests. The claimant had the authority to change the time cards. The claimant's argument that she was set up for discharge because another long time shift manager wanted the general managers job that had been given to her, gains credibility in light of the fact that Dana was trying to be paid for not taking breaks when she clearly did. In any event, the claimant's actions do not constitute misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

#### DECISION:

The July 28, 2004, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

tkh/kjf