

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

NATASIA S DILLARD

Claimant,

and

KWIK SHOP INC

Employer.

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HEARING NUMBER: 11B-UI-12397

**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: 96.5-2-A

DECISION

UNEMPLOYMENT BENEFITS ARE DENIED

The employer 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 claimant, Natasia S. Dillard, was employed by Kwik Shop, Inc. from July 19, 2009 through July 21, 2010 as a full-time clerk. (Tr. 2, 5) The employer has a personnel policy regarding theft and the consumption of products for which the claimant received three-day training and signed in acknowledgment of receipt of those policies on March 4, 2010. (Tr. 3, Exhibit 1-unnumbered p. 4) Whenever an employee consumes a product, that employee is supposed to "...write down what they consume[d] while working and at the end of their shift, they are supposed to pay for it...staple the receipt that's signed by the clerk that rang them up on their consumption log...put their consumption log where the store keeps them." (Tr. 2-3, 12) Failure to properly pay for and document consumption is considered theft and is grounds for immediate termination, which the claimant understood. (Tr. 2, 8)

On several occasions, Ms. Dillard failed to comply with the employer's consumption policy. (Tr. 4) Jeremy Glass (District Advisor) issued three warnings to the claimant for these infractions. (Tr. 4, 7, 9, 14) On July 21, 2010, the employer noted that the claimant had not completed her consumption log for the past three days that she had worked, and yet the employer observed her on video surveillance taking a pop and not paying for it just five days prior. (Tr. 3, 5, 6-7, 13) When questioned about the incident, the claimant explained that she believed she was simply replacing the pop she'd properly purchased just two days before, but it was thrown away. (Tr. 8-9, 12-13) The employer told her that replacements are not a part of the policy and terminated her that same day. (Tr. 12)

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).

Ms. Dillard admitted having knowledge of the employer's consumption policy and procedure. (Tr. 6) Thus, her justification that she was replacing the pop she'd properly purchased just two days before, but it was thrown away (Tr. 8-9), is an inadequate defense against the employer's finding of theft. Just because she thinks the employer should have such a policy does not make it so. The employer's theft/consumption policy is well communicated to its employees. (Tr. 3, Exhibit 1-unnumbered p. 4) The claimant not only admitted having knowledge of the employer's policy (Tr. 2, 6), but acknowledged that she knew her job would be in jeopardy, i.e., termination, should she fail to comply with these policies. (Tr. 8) For her to repeatedly fail to properly pay for and log her consumption of product after three warnings (Tr. 4, 7, 9, 14) is demonstrative of "carelessness or negligence of such degree of recurrence as to manifest equal culpability.. to show an intentional and substantial disregard of the employer's interest..." See, 871 IAC 24.32(1)"a", supra. Based on this record, we conclude that the employer satisfied their burden of proof.

DECISION:

The administrative law judge's decision dated October 21, 2010 is **REVERSED**. The claimant was discharged for disqualifying misconduct. Accordingly, she is denied benefits until such time she has worked in and has been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. See, Iowa Code section 96.5(2)"a".

Monique F. Kuester

Elizabeth L. Seiser

AMG/fnv

DISSENTING OPINION OF JOHN A. PENO:

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.

John A. Peno

AMG/fnv

Lastly, we note that Iowa Code section 96.6(2) (2009) provides, in pertinent part:

...If an administrative law judge affirms a decision of the representative, or the Appeal Board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5....

Although this decision disqualifies the claimant for receiving benefits, those benefits already received shall *not* result in an overpayment. Nor will the employer's account be charged.

John A. Peno

Monique F. Kuester

Elizabeth L. Seiser

AMG/fnv