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

SHANNON M LIPPER

Claimant,

and

T F M CO

Employer.

HEARING NUMBER: 09B-UI-05158

EMPLOYMENT APPEAL BOARD
DECISION

N O T I C E

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

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The claimant 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 majority of the Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Shannon Lipper (Claimant) worked for TFM Co. (Employer) from October 13, 2008 until the date of her discharge on February 18, 2009. (Tran at p. 2; p 18). The Claimant worked most recently as an assistant manager. (Tran at p. 2). The Claimant was discharged on February 18, 2009 by the Employer for the stated reason of failure to follow cash register and lottery machine procedures on February 9, 2009. (Tran at p. 2; p. 18).

On November 20, 2008 the Claimant was warned for selling alcoholic beverages to a minor. (Tran at p. 5; p. 21; Ex. A, p. 4). This was a serious verbal warning. (Tran at p. 3; Ex. A, p. 4). At the time this error occurred the Claimant was not a full-time cashier and was merely filling in for someone else.

(Tran at p. 22). She subsequently received training from the State on this subject. (Tran at p. 7-8; p. 22). The Claimant was promoted to Assistant Manager in December 2008. (Tran at p. 6-7; p. 18; Ex. A, p. 5).

On February 8, 2009 the Claimant paid out a $300.00 lottery ticket. (Tran at p. 8; p. 19; Ex. A, p. 9). The Claimant did not hit the cash button, which then failed to invalidate the ticket. (Tran at p. 8; Ex. A, p. 9). The Claimant simply hit the wrong button. (Tran at p. 9; p. 19). The Employer could not say that this was intentional. (Tran at p. 9; p. 11). The customer was able to get double payout by taking the ticket to another store. (Tran at p. 8; p. 9). At the end of the day, claimant filled out a check out sheet that should have balanced the lottery payouts with the cash register. (Tran at p. 9-10; p. 19; p. 23; Ex. A, p. 12). Lottery payouts were listed as $2.00 for the day, but the Claimant put down $302.00 for that day. (Tran at p. 10; p. 21; p. 22; Ex. A, p. 12). The Claimant's accounting error caused a delay until February 16, 2009 to discover the mistake. (Tran at p. 9-10). The Claimant had difficulty understanding the checkout procedure. (Tran at p. 19-20).

The Employer has not shown by a preponderance of the evidence that either the Claimant's failure to cancel the ticket, or her error in accounting of the lottery payouts was done intentionally.

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:
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> 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.

"This is the meaning which has been given the term in other jurisdictions under similar statutes, and we believe it accurately reflects 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 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).

When an allegation of misconduct is 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). Carelessness may be considered misconduct when an employee commits repeated instances of ordinary carelessness. Where the employee has been repeatedly warned about the careless behavior, but continues with the same careless behavior, the repetition of the careless behavior can constitute misconduct. See Greene v. Employment Appeal Board, 426 N.W.2d 659, 661-662 (Iowa App. 1988). "[M]ere negligence is not enough to constitute misconduct." Lee v. Employment Appeal Board, 616 N.W.2d 661, 666 (Iowa 2000). Where we are looking at an alleged pattern of negligence we consider the previous incidents when deciding if there is indeed a "degree of recurrence" that evidences the necessary culpability.

For something to have "recurrence" it most occur more than once. The Employer proved three incidents of errors by the Claimant. In fact it is more like only two errors since the last two errors are closely related and due to the same cause – lack of familiarity with the lottery pay out and balancing system in general. Thus the Employer has proved a minimal requirement for recurrence. This weighs against a finding of disqualifying negligence. Still, under the right circumstances, three errors, or even just two, may be enough to show "equal culpability" to intentional misconduct. Those circumstances are not here present.

The Claimant's first error was selling cigarettes and alcohol to a minor. This was not proved to be intentional, nor has the Employer showed that the Claimant was given a warning that, as a result of the error, her job would be in jeopardy by any additional errors. Still, it is clear that on this occasion the Claimant was negligent with an important matter. Nevertheless the Claimant did undertake steps to avoid such an error in the future and was subsequently promoted.

This brings us to the lottery ticket. The evidence shows that the Claimant just wasn't familiar enough with the process. In particular, the Claimant hit the wrong button when cashing in the ticket, and she compounded the error when she balanced out the lottery report that night. We agree with the Administrative Law Judge that pushing the wrong button is "excusable." A finger slip can happen to anyone. The issue, then, boils down to the accounting of the lottery payout. If we thought that the Claimant altered the accounting to cover her button-pushing error we would be in the Employer's camp. But this has simply not been proved. The Employer's witnesses did not even opine that the Claimant made the accounting error as a cover up. When the Claimant printed the Iowa Lottery Report it showed a payout of $2 and a "packs settled" of $300. The Claimant apparently took this as an obscure way of indicating that $302 in lottery payouts had been made and so she reconciled accounts accordingly. We do note that "settled" often refers to money being paid in response to some claim. The worst the

evidence

shows is that the Claimant misunderstood the cryptic "packs settled" message. The term does appear in the rules of the lottery and while we would normally expect it to refer to a physical bundle of tickets, the rules also refer to electronic packs. The testimony referred to something about using up packs of tickets and being charged $300 for them. (Tran at p. 10; p. 26). Yet, by unfortunate coincidence, the $300 listed there was precisely the amount needed to balance the account. The point is that it took someone much more familiar with this process than the Claimant – or us – to recognize that the Claimant made an accounting error. The error was not negligence to a "high degree."

We are thus left with evidence of an employee who made some – albeit really big – mistakes. Big though the errors be, a disqualification decision is not based on the amount of loss caused by the negligence but on the actions of the Claimant. Here the record shows the errors resulting from ordinary negligence in hitting the wrong key and in misunderstanding government jargon. The fact that the possible consequences of the error are very serious does not, by itself, establish misconduct.

Finally, we certainly understand why the Claimant was fired. But while the Employer may have compelling business reasons to terminate the Claimant, conduct that might warrant a discharge from employment will not necessarily sustain a disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa App. 1983). Thus the issue is not the magnitude of the risk created by the Claimant. The issue is whether the Employer has proved by a preponderance of the evidence that the Claimant committed misconduct in creating the loss and risk of loss. We conclude that it has not and benefits are therefore allowed.

DECISION:

The administrative law judge's decision dated April 28, 2009 is **REVERSED**. The Employment Appeal Board concludes that the claimant was discharged for no disqualifying reason.

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John A. Peno

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Elizabeth L. Seiser

RRA/fnv

DISSENTING OPINION OF MONIQUE KUESTER:

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.

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Monique Kuester

RRA/fnv