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

SHEILA E HYNES
7226 HILLANDALE RD
DAVENPORT IA 52806

FLYING J INC
C/O TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 05A-UI-04547-LT
OC: 04-03-05 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.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Iowa Code § 96.5(2)a – Discharge/Misconduct

STATEMENT OF THE CASE:

Employer filed a timely appeal from the April 18, 2005, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on May 19, 2005. Claimant did participate. Employer did participate through Roger Packer.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time cashier/night manager of the convenience store through March 14, 2005 when she was discharged. Employer accused claimant of selecting and consuming food without paying for it on March 4. Later in the hearing, employer said she had paid for it but not until after the consumption, but he told claimant and testified that there was no receipt in Trinity's cash bag at all; not that it was a late payment after claimant's consumption.

Gail, night manager of the restaurant, initially made the allegation that she saw claimant with the food in the employee maintenance room and Trinity, cashier, said there was not a copy of a receipt for payment of the food. Gail is still employed and Trinity is no longer employed and neither participated in the hearing. The employee maintenance room is locked and claimant does not have a key to access the room. Gail is a good friend with Randy who did not like claimant and had threatened claimant's job. Claimant had taken the issue to Roger Packer, manager, before but was ignored. Randy currently holds the job from which claimant was fired.

Employer did not know the time of the consumption or purchase and did not review surveillance cameras but relied on Trinity's representations. When an employee buys food from the deli, an employee discount is given, the purchaser signs the receipt and one copy goes to the cash drawer. Claimant's belief was that she could pay for the food when business was slow because only two employees worked at night. Claimant's March 4, 2005 receipt noted invoice number 095E9639, referenced the employee discount, the price, sales tax, total purchase amount, and method of payment. Claimant attempted multiple times to provide the receipt she has for the food purchase on March 4 but was fired without acceptance or review of the receipt. Roger Packer, manager, told claimant at separation he no longer thought the incident was theft but it would be best if they both parted ways. Packer also told claimant she was fired because of a complaint from the last night worked that she had not helped Trinity, the cashier on duty. Claimant asked for a review of the transaction logs showing how much work she did in comparison to Trinity but the logs were not produced.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes 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 issue is not whether the employer made a correct decision in separating claimant, 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 misconduct warrants denial of unemployment insurance benefits are two separate decisions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988). 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).

When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. Schmitz v. IDHS, 461 N.W.2d 603, 607 (Iowa App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14 (1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. Schmitz, 461 N.W.2d at 608.

Not only are all of the allegations based upon hearsay statements, the individuals who made those statements had personal interests at stake and are not considered reliable sources of information because of their bias and self interest. Furthermore, employer's testimony is fraught with inconsistencies as to whether or not the food was purchased, whether or not there was a receipt, and changing the reason for the separation both to claimant and at hearing. Trinity's alleged complaint about claimant not helping is not credible, as employer did not run the transaction reports to prove or disprove the allegation. Thus, employer's allegations are wholly incredible and claimant's recollection of the events is the credible basis for this decision.

An employer may discharge an employee for any number of reasons or no reason at all, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. Claimant did not engage in misconduct when she consumed food and paid for it during her shift and there is no evidence she did not perform her share of the work. Benefits are allowed.

DECISION:

The April 18, 2005, reference 01, decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

dml/sc