

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

MATHEW D KILGORE
Claimant

APPEAL NO. 06A-UI-10225-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MCDONALD'S RESTAURANT
Employer

**OC: 09/17/06 R: 01
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

McDonald's Restaurant (employer) appealed a representative's October 12, 2006 decision (reference 01) that concluded Mathew D. Kilgore (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on November 6, 2006. The claimant participated in the hearing. Angie Rezac appeared on the employer's behalf and presented testimony from one other witness, Diane Gayer. 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:

The claimant started working for the employer in March 2000 while a student. He had periods when his employment was inactive since that time, but he resumed a more active schedule on or about August 22, 2006. He worked near full-time hours as a shift manager, opening on Sundays at approximately 5:30 a.m. and closing three or four nights per week. His last day of work was September 17, 2006. The employer discharged him on September 19, 2006. The reason asserted for the discharge was a problem with opening the store as scheduled on September 17.

There are supposed to be two employees present prior to the restaurant being opened. On September 17 the claimant arrived at the restaurant by approximately 5:20 a.m. but the other employee who was scheduled to open, who was the claimant's brother, did not arrive. The claimant left sometime after 5:30 a.m. to look for his brother, but was unsuccessful.

The restaurant custodian came to the restaurant shortly before 6:30 a.m. and found it was not open; he then called Ms. Rezac, the store manager, who came and opened the store. She called the claimant at approximately 7:00 a.m., and he came and worked the remainder of the shift. He should have called Ms. Rezac when he was unable to open the restaurant due to the

other employee not reporting, but he did not have her telephone number available to him; and if he went into the store to find her number, he would be in violation of the safety and security protocol to have at least two employees present.

The claimant had overslept until about 8:30 a.m. for his shift on September 3 and had been warned that could not happen again.

REASONING AND CONCLUSIONS OF LAW:

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). The question 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 matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

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 his failing to open the restaurant as scheduled on September 17, 2006. Tardies are treated as absences for purposes of unemployment insurance law. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The presumption is that oversleeping is generally within an employee’s control. Higgins, supra. However, the incident on September 17 was not the same situation as the tardy due to oversleeping on September 3, 2006. Rather, the question as to September 17 is with regard to how the claimant handled the situation of being available at the scheduled time for work but not being able to open the store due to the second person not reporting for work. Under the circumstances of this case, the claimant’s handling of the situation that day was the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence in an isolated instance, and was a good-faith error in judgment or discretion. 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 October 12, 2006 decision (reference 01) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/kjw