

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

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CYNTHIA K SPARROW	:	
	:	
Claimant,	:	HEARING NUMBER: 10B-UI-15752
	:	
and	:	
	:	EMPLOYMENT APPEAL BOARD
	:	DECISION
WEAVER ENTERPRISES LTD	:	
	:	
Employer.	:	

**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: 96.5-2A**

**DECISION**

**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 Employment Appeal Board **REVERSES** as set forth below.

**FINDINGS OF FACT:**

The claimant, Cynthia K. Sparrow, was employed by Weaver Enterprises, Ltd. from April 24, 2006 through September 9, 2009 as a full-time assistant manager. (Tr. 3-4, 7, 12) The employer has a policy that requires managers to contact the Director of Operations (Terry Moffitt) or the Area supervisor (Chuck Vandenburg) if the cash register drawer is over or under \$5; and if the shortage is over \$50, both men should be contacted. (Tr. 4, 5, 9, 13, 17, 18) The claimant was aware that she should contact one of the men if there was a shortage. (Tr. 13, 18)

In August of 2009, the employer observed the claimant on camera letting herself and other employees use each other's drawers. (Tr. 8, 10) The employer issued a written warning to her for violating

company policy. (Tr. 10, 15)

On September 8, 2009, Ms. Sparrow noted the drawer was short \$94 cash when she closed the restaurant. (Tr. 4, 7, ) She immediately informed her immediate supervisor, Josh Shallzross who was the store's general manager. (Tr. 13) Ms. Sparrow also called Mr. Vandenburg, leaving him a voicemail since he didn't answer; she then sent her usual daily e-mail to him explaining the day's events, which included the \$94 cash shortage. (Tr. 13) Her e-mail indicated that she was unable to find what she believed was an error, but that she informed Josh about it. (Tr. 13-14) The store had had shortages in the past, but by morning, the matter was 'fixed.' (Tr. 15)

The next morning, Josh contacted Mr. Vandenburg who, in turn, contacted Mr. Moffit to inform them of the shortage. (Tr. 5, 7, 17) The area supervisor came to the store, 'rectified' the drawer and discovered that there actually was no \$94 shortage. (Tr. 5, 8) The following day, Mr. Vandenburg came to the store and terminated the claimant for failing to contact both him and Mr. Moffitt about the shortage.

#### 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).

The claimant admitted the shortage. But according to the employer's testimony, the claimant made no comment about calling him when he confronted her the next morning. (Tr. 9) Vandenburg's testimony is not probative that Ms. Sparrow did not, in fact, call him pursuant to company policy, particularly given her testimony that she did contact Vandenberg by phone (voicemail) and by e-mail, as well as notified her immediate supervisor about the shortage. (Tr. 13-14) To further weaken the employer's case about the claimant's violation of the notification policy, Vandenburg provided nebulous testimony in that he couldn't recall 1) if she called; 2) what she said if she called (Tr. 8); and 3) whether or not he asked her if she called. (Tr. 9) The employer failed to provide any firsthand witness (Josh Shallzross the general manager who was actually present during the incident) to refute the claimant's testimony that Ms. Sparrow contacted both the manager and Vandenburg when she first became aware of the shortage. Thus, we attribute more weight to the claimant's version of events.

While Ms. Sparrow, admittedly, did not contact Moffitt pursuant to company policy for shortages exceeding \$50, we find her actions reasonable in light of her credible testimony that she did not know she needed to contact both the director of operations and the area supervisor. (Tr. 18) The claimant reasonably believed that her contact of both the general manager (Shallzross) and the area supervisor (Vandenburg) was sufficient, and we find that she substantially complied with the store's notification policy. The fact that there was no shortage at all further mitigates her alleged culpability. Based on this record, we conclude that the employer failed to satisfy their burden of proof.

#### **DECISION:**

The administrative law judge's decision dated November, 23, 2009 is **REVERSED**. The claimant was discharged for no disqualifying reason. Accordingly, she is allowed benefits provided she is otherwise eligible.

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John A. Peno

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Elizabeth L. Seiser

AMG/fnv

**DISSENTING OPINION OF MONIQUE F. 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 F. Kuester

AMG/fnv

A portion of the claimant's appeal to the Employment Appeal Board consisted of additional evidence which was not contained in the administrative file and which was not submitted to the administrative law judge. While the appeal and additional evidence (documents) were reviewed, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today's decision.

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John A. Peno

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Elizabeth L. Seiser

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Monique F. Kuester

AMG/fnv