

**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**

**DANIEL J DURHAM
2424 DIVISION
LOT 4
BURLINGTON IA 52601**

**HY-VEE FOOD STORES INC
c/o TALX UCM SERVICES INC
PO BOX 283
ST LOUIS MO 63166-0283**

**DAVID WILLIAMS
TALX UC EXPRESS
3799 VILLAGE RUN DR #511
DES MOINES IA 50317**

**Appeal Number: 06A-UI-07965-H2T
OC: 07-02-06 R: 04
Claimant: Appellant (2)**

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)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the August 1, 2006, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on August 24, 2006. The claimant did participate. The employer did participate through Tim Cernin, assistant store director, Sara Christensen, Cook and Catering helper, Sharon Willits, cashier, and Sarah Lloyd, observer and Human Resources Coordinator, and was represented by David Williams of TALX UC eXpress.

ISSUE:

Was the claimant discharged for work related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a dishwasher in the cafeteria area of the grocery store part time beginning February 26, 2005 through July 4, 2006, when he was discharged. The claimant was discharged for intentionally breaking or destroying company property. On June 27, 2006, the claimant was working in the dish room unloading the dishwasher when he was observed by Sharon Willits to pick up a large stack of plate out of the dishwasher. After grabbing the plates, he was unable to hold onto all of them and 4 or 5 fell to the floor and broke. Ms. Willits had gone into the dish room to ask the claimant to work a little more quietly, as he was so loud the customers could hear all the pots and pans being banged around in the dish room. While Ms. Willits believes the claimant intentionally broke the plates, the claimant himself denies ever purposely breaking any plates or dishes. After the plates fell to the floor, Ms. Willits told the claimant he should be taking the plates out of the dishwasher one-by-one and the claimant laughed. The pancake dispenser was also broken on June 27, but no one saw the claimant break it or do anything to damage it. While some other employees suspect that the claimant damaged the pancake dispenser, the claimant denies doing any harm to it.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the 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.

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 employer discharged the claimant and has the burden of proof to show misconduct. 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).

The employer's evidence does not establish that the claimant deliberately and intentionally acted in a manner he knew to be contrary to the employer's interests or standards. There was no wanton or willful disregard of the employer's standards. There is no credible evidence the claimant had anything to do with breaking the pancake dispenser. In short, substantial misconduct has not been established by the evidence. While the employer may have had good cause to discharge, conduct which 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)

The claimant's actions, that is attempting to remove many plates from the dishwasher in one attempt represent poor judgment, but the action itself does not rise to the level of misconduct sufficient to disqualify him from receiving unemployment insurance benefit. Although the claimant's conduct was improper, the conduct does not rise to the level of disqualification by standards of either frequency or severity. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The August 1, 2006, reference 01, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

tkh/kjw