

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

HEATHER M SMITH
Claimant

APPEAL NO. 11A-UI-02037-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

NELLIS MANAGEMENT COMPANY
Employer

OC: 12/05/10
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated February 20, 2011, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on March 24, 2011. Claimant participated. Employer participated by John Harmsen, chief financial officer, and John Blanchard, area supervisor. The record consists of the testimony of John Harmsen; the testimony of John Blanchard; and the testimony of Heather Smith.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a restaurant management company that operates Long John Silvers restaurants. The claimant worked at a restaurant in Des Moines, Iowa. The claimant was hired on November 1, 2007, as an associate. She was later promoted to a full-time crew chief position. Her last day of work was December 9, 2010. She was terminated on December 9, 2010.

The claimant was terminated for three reasons. The first reason was what the employer deemed dishonest/deceptive behavior. On two occasions the claimant had punched in before her start of shift. The employer could not state when those early punch times occurred. Written warnings were given on November 8, 2010. The claimant did not receive these write-ups until the time she was terminated.

The second reason was an IOU that the claimant had put in the safe for \$20.00. No exact date could be given for this incident. The claimant's husband had not gotten his paycheck and called the claimant at work to tell her. The claimant began crying because she had no money to buy diapers for her baby or put gas in her car. The claimant's general manager told the claimant

that she could put an IOU in the safe, which the claimant did. She paid the money back two days later.

The third reason was the employer's discovery that there were 55 voided transactions on the claimant's access code that did not have any documentation. A voided transaction occurs when a customer's money is refunded. A manager must approve any voided transaction. The ticket in question is then signed by the manager. The parties do not agree on whether the customer is also supposed to sign the ticket. The employer became aware of these voided transactions a week or two before Thanksgiving 2010. An investigation ensued. The claimant denied she ever took any money from the employer as the result of a voided transaction. Other employees could have access to her management code and used that code to void transactions.

The employer has a written policy, of which the claimant was aware, that misappropriation of the employer's property would lead to termination.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be

based on such past act or acts. The termination of employment must be based on a current act.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. The legal definition of misconduct excludes errors of judgment or discretion in isolated situations. In order to justify disqualification, the evidence must establish that the final incident leading to the decision to discharge was a current act of misconduct. See 871 IAC 24.32(8). See also Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988). The employer has the burden of proof to show misconduct.

One of the most fundamental duties owed by the claimant to the employer is honesty. Theft of company property would be a material breach of that duty. There are two allegations of misconduct that concern theft. The first is that the claimant clocked in early in two instances. The employer, however, could not say when that occurred other than pointing to two written warnings on November 8, 2010. The claimant testified she was never told about this until she was terminated. She also testified that if she clocked in early, she had permission to do so. Even if the claimant did clock in early without permission, events that were not documented until November 8, 2010, are not current acts of misconduct.

The second allegation is the voided transactions. The employer's assumption is that the use of the claimant's manager's number to void 55 transactions without accompanying documentation is evidence that the claimant misappropriated cash from the employer by making phony refunds to customers. This conclusion is understandable. The claimant denied, however, that she ever took cash from the employer. She also testified that other employees, including non-managers, used manager's codes to void transactions. There is no surveillance footage or other keystroke information that might confirm the claimant's or the employer's version of events. The administrative law judge concludes that there is insufficient proof in this record to show that it was the claimant who took the money as a result of the voided transactions.

The claimant was also terminated for using an IOU to cover an emergency cash shortage. The claimant admitted that she did this and that it was very poor judgment on her part. She only did it after her general manager told her that she could do it. The money was paid back within two days. The administrative law judge concludes that this was an example of poor judgment in an isolated situation. The claimant should not have borrowed money from her employer but her immediate supervisor did tell her it was okay for her to do so. Again, it is not known when this occurred and thus there is also a question of whether it is a current act of misconduct.

The employer may have had good business reasons for terminating the claimant. However, the evidence fails to establish misconduct sufficient to disqualify the claimant from receiving unemployment insurance benefits. Benefits are allowed, if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated February 10, 2011, reference 01, is reversed. Unemployment insurance benefits are allowed provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs