

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**BARBARA A JAMES**  
Claimant

**APPEAL NO. 08A-UI-11120-DT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**KWIK SHOP INC**  
Employer

**OC: 10/19/08 R: 04  
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

Kwik Shop, Inc. (employer) appealed a representative's November 19, 2008 decision (reference 01) that concluded Barbara A. James (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 December 11, 2008. The claimant participated in the hearing. Tammy Conrad of TALX Employer Services appeared on the employer's behalf and presented testimony from one witness, Connie McMorrان. 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 on March 29, 2008. She worked part time (approximately 30 hours per week) as a clerk in the employer's Davenport, Iowa, convenience store. Her last day of work was October 18, 2008. The employer discharged her on October 19, 2008. The reason asserted for the discharge was getting a second "red card" for failing to check identification for the sale of a tobacco product to a person who appeared to be less than 27 years old.

While the sale of tobacco products to persons under age 18 is illegal, the employer's policy, of which the claimant was aware, was that the clerks were to check the identification of any customer buying a tobacco product who appeared to be less than 27 years old. On October 18 the claimant had sold a tobacco product to a person who appeared to be about 25 years old without checking the person's identification; the person was a "secret shopper" for the "red card" program and gave the claimant a "red card." The claimant acknowledged that while she was pretty confident that the person was over 18, she also did not appear to be at least 27, and that she should have checked the person's identification but did not.

The employer's policy, of which the claimant was aware, provided that an employee would be discharged if they got two "red cards." The claimant had been given a "red card" and a disciplinary warning after an incident on July 7. The claimant had sold a tobacco product to a person who appeared to be under age 27 without checking her identification; however, the claimant had done so because she knew the "secret shopper" from some prior employment and from that context knew that the shopper was over 18. The employer's policy does not require an employee to recheck a customer's identification if they have previously verified the customer's age. The claimant disputed the July "red card" but went through the mandatory retraining on the program on July 10. When she spoke to the person handling the retraining, the trainer agreed that under the situation of the claimant's familiarity with the shopper, the red card and disciplinary warning should not have been imposed. The trainer made a call on behalf of the claimant urging that the red card and warning be made "null and void."

The claimant followed up with the employer's area supervisor later that month; the area supervisor responded, "Don't worry about it, it has been taken care of." The claimant assumed from that conversation that the July "red card" and warning had been made "null and void." However, when the October 18 episode occurred, the July incident was still applied by the employer so that the October incident was a second incident, resulting in discharge.

#### **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).

In order to establish misconduct such as to disqualify a former employee from benefits, an employer must establish the employee was responsible for a deliberate act or omission that was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior that 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is the claimant having been given a second "red card" for failing to check the identification of a customer buying a tobacco product who appeared to be under the age of 27. Misconduct connotes volition. Huntoon, supra. The

final incident must have occurred despite the claimant's knowledge that the occurrence could result in the loss of her job. Cosper, supra; Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). The claimant acknowledged that she was in error in not checking the identification on October 18, but did not realize that this failure on that date would jeopardize her job, as she believed in good faith that the employer had voided out the prior "red card" and warning as having been in error. Under the circumstances of this case, the claimant's failure to check the identification of a person who appeared to be under age 27 but was otherwise not known to her as being of at least legal age 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 November 19, 2008 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 she is otherwise eligible.

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Lynette A. F. Donner  
Administrative Law Judge

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Decision Dated and Mailed

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