

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LESLIE L DENTON
Claimant

APPEAL NO. 07A-UI-01026-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**APPLEBEE'S NEIGHBORHOOD GRILL
& BAR**
Employer

**OC: 01/07/07 R: 04
Claimant: Appellant (1)**

Section 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

Leslie Denton filed an appeal from a representative's decision dated January 24, 2007, reference 01, which denied benefits based on her separation from Applebee's Neighborhood Grill & Bar (Applebee's). After due notice was issued, a hearing was held by telephone on February 16, 2007. Ms. Denton participated personally and Exhibit A was admitted on her behalf. The employer participated by Dale Sandvig, General Manager, and Marc Van Buren, Regional Manager. Exhibits 1 through 20 were admitted on the employer's behalf.

ISSUE:

At issue in this matter is whether Ms. Denton was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all of the evidence in the record, the administrative law judge finds: Ms. Denton was employed by Applebee's from October 7, 2002 until December 22, 2006 as a full-time bartender. The decision to discharge her from the employment was based on an allegation that she failed to receive payment for nine beers on December 22. Because of suspicions that Ms. Denton was not ringing up all sales, Dale Sandvig was monitoring her activities on December 22. It was later determined that she failed to ring up nine of the beers she was observed serving during her shift. As a result of her actions, she was discharged the same day. The value of the beers that were not rung up was approximately \$45.00.

Mr. Sandvig did not have Ms. Denton under constant surveillance. He determined the number of beers she served on December 22 by observing the level of beer in customers' bottles as he walked through the restaurant. Ms. Denton only rang in three beers during her shift. The last occasion on which she failed to ring up all items was December 9, 2005. She failed to ring up one soda and 2 kid's drinks. The incident was noted to be her first offense.

REASONING AND CONCLUSIONS OF LAW:

Ms. Denton was discharged from employment. An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The employer alleged that Ms. Denton was giving away beer in violation of policy. The employer's method for determining how much beer was served was not very precise. Mr. Sandvig was observing the level of beer in bottles as he walked by them. However, even if his count was off by as many as three, it would still mean six beers were not paid for. Ms. Denton submitted a statement from one of the customers present on December 22. He indicated that all items served were on the bill presented by Ms. Denton. He was not made available for examination and cross-examination. The administrative law judge has no basis on which to accord his unsworn statement more credence than Mr. Sandvig's sworn testimony regarding his observations.

If it were a matter of only one or two beers not being paid for, the administrative law judge would be inclined to view Ms. Denton's actions as ordinary negligence. When the number reaches as many as six, the administrative law judge must conclude that her actions were intentional. Intentionally giving away merchandise belonging to one's employer constitutes a substantial disregard of the standard of behavior the employer has the right to expect. It is concluded, therefore, that disqualifying misconduct has been established by the evidence. Accordingly, benefits are denied.

DECISION:

The representative's decision dated January 24, 2007, reference 01, is hereby affirmed. Ms. Denton was discharged for misconduct in connection with her employment. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly job insurance benefit amount, provided she satisfies all other conditions of eligibility.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/css