

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**SYLVESTER DANIEL**

Claimant

**APPEAL NO. 08A-UI-00504-HT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**GARY'S RESTAURANT & CATERING INC**

Employer

**OC: 12/16/07 R: 03  
Claimant: Respondent (2)**

Section 96.5(2)a – Discharge

**STATEMENT OF THE CASE:**

The employer, Gary's Restaurant and Catering, Inc. (Gary's), filed an appeal from a decision dated January 7, 2008, reference 01. The decision allowed benefits to the claimant, Sylvester Daniel. After due notice was issued, a hearing was held by telephone conference call on January 30, 2008. The claimant participated on his own behalf. The employer participated by Owner Gary Shoemaker and Kitchen Workers Jan Sass and Judy Zmolek.

**ISSUE:**

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

**FINDINGS OF FACT:**

Sylvester Daniel was employed by Gary's Restaurant from August 14, 2006 until December 14, 2007, as a full-time kitchen manager. During the course of his employment, the claimant had engaged in some questionable activities. He had allowed an employee to write an IOU for food, which was not allowed, and he gave a work-study employee a 50 percent discount on food. This was not allowed, because only employees of Gary's Restaurant at the college were entitled to the discount. On another occasion, Mr. Daniel took a large container of fruit salad home without paying for it. His food was free only as long as it was consumed on the premises.

Owner Gary Shoemaker was aware of these events but did not issue any warnings to the claimant. However, on December 12, 2007, he was informed by a kitchen worker that on October 19, 2007, Mr. Daniel had ordered food from Gary's Restaurant for a faculty event at the college. He intentionally ordered an extra pie that he could take and serve to his staff. He did not have authorization from the owner to do this, and the faculty event was charged for the pie he took.

The claimant was questioned about the pie incident and admitted he had taken it for his staff. Mr. Shoemaker then mentioned the other incidents and notified the claimant that these incidents of theft were unacceptable and he was discharged.

Sylvester Daniel has received unemployment benefits since filing a claim with an effective date of December 16, 2007.

### **REASONING AND CONCLUSIONS OF LAW:**

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 was very remiss in not talking to the claimant about the prior incidents of policy violations and theft. An employee is entitled to know his conduct was unacceptable and would possibly be held against him.

However, the final incident was clearly a case of theft, intentionally committed by the claimant. He ordered a pie for which he did not intend to pay, without permission from the employer, and knew it would likely be charged to the faculty event, but not served to the attendees. This is a willful and deliberate act on his part to take food belonging to the employer, charged to someone else, and appropriate it for his own use. This is conduct not in the best interests of the employer and the claimant is disqualified.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department

in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The claimant has received unemployment benefits to which he is not entitled. These must be recovered in accordance with the provisions of Iowa law.

**DECISION:**

The representative's decision of January 7, 2008, reference 01, is reversed. Sylvester Daniel is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount, provided he is otherwise eligible. He is overpaid in the amount of \$2,160.00.

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Bonny G. Hendricksmeier  
Administrative Law Judge

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Decision Dated and Mailed

bgh/kjw