

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CONNIE B PLOWMAN
Claimant

APPEAL NO. 09A-UI-05150-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DIAMOND JO CASINO
Employer

OC: 03/08/09
Claimant: Appellant (2)

Section 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

Connie Plowman filed an appeal from a representative's decision dated March 27, 2009, reference 01, which denied benefits based on her separation from Diamond Jo Casino. After due notice was issued, a hearing was held by telephone on April 29, 2009. Ms. Plowman participated personally. The employer participated by Beth Stephenson, Director of Human Resources.

ISSUE:

At issue in this matter is whether Ms. Plowman 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. Plowman was employed by Diamond Jo Casino from August 20, 2008 until February 27, 2009 as a full-time food server. She was discharged based on an allegation that she stole a tip intended for another server.

When Ms. Plowman returned from break on February 27, she began clearing tables in her section. One of the tables in her section had been assigned to a different server. Ms. Plowman removed the tip money on the table and placed it in her pocket. When she saw that the service ticket had another server's name on it, she replaced the tip money on the table with the ticket. Someone reported to management that Ms. Plowman had pocketed \$1.00 of the \$2.00 left by the guest. As a result, she was discharged the same day. Ms. Plowman had been suspended from work on January 17 due to an allegation that she removed someone else's tip, an allegation she denied. Because there was no proof of theft at that time, Ms. Plowman was allowed to continue the employment.

REASONING AND CONCLUSIONS OF LAW:

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). Ms. Plowman was discharged based on an allegation that she stole a tip that belonged to another server. The employer's only evidence on the issue was hearsay. Although hearsay testimony is admissible, the administrative law judge is not inclined to give it more weight than sworn, credible first-hand testimony.

The individual who witnessed Ms. Plowman's handling of the tip on February 27 is still employed by the casino. However, she was not offered as a witness to be examined and cross-examined concerning her observations. Ms. Plowman did not deny that she placed the tip money in her pocket before she realized it was for a different server. The witness who reported the matter was not made available to answer questions regarding her physical proximity to Ms. Plowman at the time of the incident or the extent to which she observed her actions with the tip money. Inasmuch as Ms. Plowman's explanation was credible, it is concluded that she did not steal tip money from a coworker on February 27.

The administrative law judge is not unmindful of the fact that Ms. Plowman had been suspended in January based on suspicious activities that caused the employer to believe she was guilty of theft. However, the employer acknowledged that there was no evidence to support the January allegation. Because the employer failed to establish that Ms. Plowman was guilty of theft on February 27, it must be concluded that disqualifying misconduct has not been established. Accordingly, benefits are allowed.

DECISION:

The representative's decision dated March 27, 2009, reference 01, is hereby reversed. Ms. Plowman was discharged but disqualifying misconduct has not been established. Benefits are allowed, provided she is otherwise eligible.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/css