

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TINA M LACOCO
Claimant

APPEAL NO. 09A-UI-16192-VS

**ADMINISTRATIVE LAW JUDGE
DECISION**

D OF S FOODS INC
Employer

**Original Claim: 09/20/09
Claimant: Respondent (2-R)**

Section 96.5-2-a – Misconduct
Section 96.3-7 – Overpayment of Benefits

STATEMENT OF THE CASE:

The employer filed an appeal from a representative's decision dated October 21, 2009, reference 01, which held the claimant eligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on January 28, 2010, in Cedar Rapids, Iowa. The employer participated by Mario Zuniga, operations supervisor; Lyndsee Detra, human resources manager; and Denise Grunewald, store manager. The claimant failed to respond to the hearing notice and did not participate. The record consists of the testimony of Mario Zuniga; the testimony of Lyndsee Detra; the testimony of Denise Grunewald; and Employer's Exhibits 1 through 15.

ISSUES:

Whether the claimant was discharged for misconduct; and

Whether the claimant has been overpaid unemployment insurance benefits.

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 owns and operates a McDonald's restaurant in Washington, Iowa. The claimant was hired on January 9, 2008, as a crew member and was later promoted to swing manager. She was terminated on September 22, 2009.

The incident that immediately preceded the claimant's termination occurred on September 21, 2009. The employer, who owns and operates a number of McDonald's restaurants, was holding a food safety class in Washington. The manager from the Mormon Trek store, Brittany, was instructed to go the restaurant in Washington and get a manager meal for lunch. When she got to the restaurant, she asked for the manager—Denise Grunewald. The claimant was rude to Brittany. She told Brittany that Denise was not there and that she was not giving away free food. The claimant turned her back on Brittany, leaving Brittany to pay for her food. The

claimant's treatment of Brittany was reported to Denise, as Brittany was considered to be a customer at the time she came in for her manager meal.

Ms. Grunewald reported the incident to Mario Zuniga, who is the operations manager. The claimant was placed on suspension, pending further investigation. The claimant had just come off a three-day suspension on September 11, 2009, for rudeness. The claimant had just been sent to a Hospitality Class on September 8, 2009, which covered McDonald's policy, including such things as ambiance, image, and the hospitality credo. Lyndsee Detra conducted the class and specifically told the attendees that rude behavior would not be tolerated from any management employee in any store. (Exhibit 9) The claimant had also attended a basic management course in order to do her job as a swing manager.

Mr. Zuniga made the decision to terminate the claimant. He based this decision on the claimant's prior suspension for rude behavior and her recent attendance at the hospitality course, as well as the basic management course.

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.

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 employer has the burden of proof to show misconduct.

An employer that provides goods and services to the public can reasonably expect that its employees will be courteous and attentive to the employer's customers. The claimant was a manager and not only was she responsible for her own behavior towards customers, but setting a good example for other employees. The evidence in this case established that the employer had concerns about the claimant's rude behavior and had suspended her for three days on September 11, 2009. She had just attended a hospitality class where the employer had emphasized the importance of customer service. She knew that she could be terminated for treating a customer rudely. In spite of this, the claimant's inappropriate behavior continued. The claimant deliberately chose to ignore her employer's explicit instructions on treatment of customers. Misconduct has been established. Benefits are denied.

The next issue is overpayment of benefits.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

This matter is remanded to the claims section for a determination of the overpayment issue.

DECISION:

The representative's decision dated October 21, 2009, reference 01, is reversed. Unemployment insurance benefits shall be withheld until the claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. This matter is remanded to the claims section for a determination of the overpayment issue.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/kjw