

IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI

NELLIE POTTS  
21725 MAYSVILLE RD  
WALCOTT IA 52773-9589

GOOD SAMARITAN SOCIETY INC  
c/o TALK UC EXPRESS  
PO BOX 283  
ST LOUIS MO 63166-0283

Appeal Number: 06A-UI-01983-AT  
OC: 01-22-06 R: 04  
Claimant: Respondent (2)

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4<sup>th</sup> Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

---

(Administrative Law Judge)

---

(Decision Dated & Mailed)

Section 96.5-2-a – Misconduct  
871 IAC 24.26 (21) – Resignation in Lieu of Discharge  
Section 96.3-7 – Recovery of Overpayments

STATEMENT OF THE CASE:

Good Samaritan Society, Inc., filed a timely appeal from an unemployment insurance decision dated February 7, 2006, reference 01, which allowed benefits to Nellie Potts. After due notice was issued, a telephone hearing was held March 3, 2006, with Ms. Potts participating and presenting additional testimony by Nancy McConnell. Human resources director Pam Lundgren participated for the employer. Employer Exhibit One was admitted into evidence.

## FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: Nellie Potts was employed full time as a certified nursing assistant by Good Samaritan Society, Inc., from May 16, 1994 until she resigned in lieu of being discharged on January 12, 2006. On January 11, 2006, Ms. Potts took 11 pork chops and a piece of pot roast from the employer's walk-in refrigerator for personal use. She was not authorized to enter the walk in refrigerator because she did not ordinarily wear a hair net while working. She was not allowed to take food for personal use without permission. Ms. Potts also marked her own meal ticket, charging herself \$3.00 for the 11 pieces of meat. The kitchen staff marks meal tickets for employees. The employer has a policy prohibiting theft. Employees may be discharged upon the first instance of theft. Ms. Potts received a copy of the applicable rules. Ms. Potts has received unemployment insurance benefits since filing a claim effective January 22, 2006.

## REASONING AND CONCLUSIONS OF LAW:

The question is whether the claimant's separation from employment was a disqualifying event. It was.

Although Ms. Potts technically resigned, she did so only after being given the option of resigning or being discharged immediately. A separation under such circumstances is analyzed as if it had been a discharge. See 871 IAC 24.26 (21). The issue is whether the evidence establishes that the employment ended because of misconduct.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The evidence establishes that Ms. Potts deliberately took food belonging to the employer for personal use, that she did not have permission to take the food, and that the employer has a

rule providing for discharge on the first instance of theft. This evidence is sufficient to establish misconduct.

In her defense, Ms. Potts stated that a certain part-time server had in the past allowed her to take food. She acknowledged that the server had not told her that she could do so in this instance. She also acknowledged that the server would not be a person with authority to grant permission in any event. A reasonable person would not conclude that he or she had permission to take food belonging to the employer under these circumstances.

Ms. Potts has received unemployment insurance benefits to which she is not entitled. They must be recovered in accordance with the provisions of Iowa Code section 96.3-7.

**DECISION:**

The unemployment insurance decision dated February 7, 2006, reference 01, is reversed. Benefits are withheld until the claimant has worked in and has been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. She has been overpaid by \$927.00

kkf/kjw