

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ASHLEY N MCDANIEL
Claimant

APPEAL NO. 09A-UI-11644-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FLYING J INC
Employer

OC: 07/05/09
Claimant: Respondent (2-R)

Section 96.5(2)a – Discharge for Misconduct
Section 96.3(7) – Recovery of Overpayments

STATEMENT OF THE CASE:

Flying J, Inc. filed an appeal from a representative's decision dated August 4, 2009, reference 01, which held that no disqualification would be imposed regarding Ashley McDaniel's separation from employment. After due notice was issued, a hearing was held by telephone at 2:00 p.m. on August 27, 2009. The employer participated by Cindy Concannon Colter, Assistant Manager.

Ms. McDaniel contacted the administrative law judge at 3:30 p.m. on August 26 to request a postponement of the hearing because she had a dental appointment. Because she had known of the dental appointment for some time, her last-minute request for a postponement was denied as not being timely made. An attempt was made to contact her at the scheduled time of the hearing but only her voicemail was received. Ms. McDaniel contacted the administrative law judge on August 28 and indicated she had been with the dentist from 10:00 a.m. until 3:30 p.m. on August 27 having her wisdom teeth removed. She was given the opportunity to provide proof that she was not available for the hearing and agreed to do so. As of the date of the decision herein, the requested verification had not been received. Therefore, the hearing record will not be reopened.

ISSUE:

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

FINDINGS OF FACT:

Having heard the testimony and having reviewed all of the evidence in the record, the administrative law judge finds: Ms. McDaniel was employed by Flying J, Inc. from May 17, 2007 until June 7, 2009 as a full-time server. She was discharged after she stole approximately \$375.00 from the employer on June 7. She was observed on surveillance video removing money from the cash drawer and placing it in her apron. She did not return to work thereafter and did not respond to the employer's attempts to reach her by telephone. The employer filed criminal charges, which were still pending at the time of the hearing.

Ms. McDaniel filed a claim for job insurance benefits effective July 5, 2009. She has received a total of \$1,600.00 in benefits since filing the claim.

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. McDaniel was discharged due to theft from her employer, which is clearly contrary to the type of behavior an employer has the right to expect. As such, it must be concluded that substantial misconduct has been established. Accordingly, benefits are denied.

Ms. McDaniel has received benefits since filing her claim. Based on the decision herein, the benefits received now constitute an overpayment. As a general rule, an overpayment of job insurance benefits must be repaid. Iowa Code section 96.3(7). If the overpayment results from the reversal of an award of benefits based on an individual's separation from employment, it may be waived under certain circumstances. An overpayment will not be recovered from an individual if the employer did not participate in the fact-finding interview on which the award of benefits was based, provided there was no fraud or willful misrepresentation on the part of the individual. This matter shall be remanded to Claims to determine if benefits already received will have to be repaid.

DECISION:

The representative's decision dated August 4, 2009, reference 01, is hereby reversed. Ms. McDaniel was discharged for disqualifying misconduct. Benefits are withheld until she has worked in and been paid wages for insured work equal to ten times her weekly job insurance benefit amount, provided she is otherwise eligible. This matter is remanded to Claims to determine the amount of any overpayment and whether Ms. McDaniel will be required to repay benefits.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/css