

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**YUEH-FONG MCCASLIN**  
Claimant

**APPEAL NO: 13A-UI-04929-ET**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**HARVEYS BR MANAGEMENT CO INC**  
Employer

**OC: 03-24-13**  
**Claimant: Respondent (2R)**

Section 96.5-2-a – Discharge/Misconduct  
Section 96.3-7 – Recovery of Benefit Overpayment

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the April 15, 2013, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on June 3, 2013. The claimant participated in the hearing. Vicky Broussard, Human Resources Generalist, participated in the hearing on behalf of the employer.

**ISSUE:**

The issue is whether the employer discharged the claimant for work-connected misconduct.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time bartender for Harveys BR Management Company from October 11, 1999 to March 21, 2013. She was discharged from employment after being observed giving free drinks to customers on several occasions including March 14 and 16, 2013. The employer conducted an investigation that “substantiated that (the claimant) engaged in theft of company assets by not ringing in beverages” (Employer’s Exhibit One).

The investigation was conducted, in part, by the surveillance department. On March 14, 2013, the claimant was observed ringing in a bottle of beer as a comp without a guest ordering it and putting the comp ticket on the register; she gave a bottle of beer to a customer and took that ticket to a diamond player to sign; she rang in a tap beer, ticket number 3607, without a guest ordering it and saved the ticket on the register; the claimant took ticket 3607 off the register, poured a tap beer, gave it to a guest and had the diamond player sign it; she took a comp ticket out of her tip cup, looked at the ticket on the register and checked the micro for the time before taking the ticket from her tip cup and putting it on the register and then placed the other ticket in her tip cup; she got a tap beer ticket (3621) off the register, received a tip and put the tip in her tip cup and then put that ticket back on the register; she then took ticket 3621 off the register

and threw it in the trash; a guest ordered a soda and the claimant took the ticket (3624) off the register and had the guest sign it; she then poured a tap beer but did not ring it in; and she took a bottle of beer and a tap beer and rang in two tap beers as cash when she should have rung them up as a bottle of beer and a tap beer (Employer's Exhibit One).

On March 16, 2013, the claimant was observed ringing in a tap beer as a comp, giving it to a guest and having the Diamond player sign for it; she rang in two red beers and put the tips in her cup and one minute later she took the tip out of her cup, opened the cash drawer, opened the \$1.00 cash department and pulled the \$1.00 tip from her tip cup, putting the \$5.00 that should have been placed in the drawer in the first place in her tip cup, realized her error and corrected it herself instead of calling for a supervisor as required by the employer's policy; she poured a cup of tomato juice and rang it up, did not have the guest sign the ticket, and placed the unsigned comp ticket on the register; she rang in a tap beer comp and gave it to the guest and received a tip and then had the Diamond player sign for it; she poured a cranberry juice and set it on the counter without ringing it up; she poured another cranberry juice with grenadine, cherries and limes and did not ring it up; she had three tickets stored on the cash register; she rang in a bottle of beer and gave it to a guest and had the Diamond player sign the ticket; she took a bottle of beer and took the unsigned ticket from the register and had the guest sign it; and she rang in four bottles of beer as a cash sale and allowed the guest to leave with all four bottles even though guests are only allowed to take two beers at a time (Employer's Exhibit One).

The employer placed the claimant on unpaid investigative suspension March 20, 2013, while it "fully investigated" whether the claimant was following proper department transaction policy procedures (Employer's Exhibit Two). The employer reviewed the video and its policies and procedures and determined, "On numerous occasions it was observed that (the claimant) gave drinks to guests without ringing them in the micros system for payment. The beverages should have been rang in as cash or comp drinks in the micros system. This behavior was notated on several different occasions (Employer's Exhibit Six). "The investigation substantiated that (the claimant) engaged in theft of company assets by not ringing in beverages (Employer's Exhibit Six). The employer terminated the claimant's employment for theft March 21, 2013 (Employer's Exhibits Three, Four and Six).

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

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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 claimant engaged in theft of company property by giving drinks to customers without ringing them up on the employer's system as required by the employer's policy. The claimant was an experienced employee and her actions show a pattern of ignoring the employer's policies. The employer's investigation determined the claimant violated numerous employer policies and procedures regarding department "proper transaction policy." The claimant also violated "numerous conduct standards," including one stating, "Team members will not participate in theft, misappropriation, misuse or willful destruction of ... company property." Team members will use professional judgment and will refrain from acts of gross misjudgment, carelessness, negligence in the performance on one's job, or any serious conduct detrimental to the orderly and ethical operation of the business." Under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits are denied.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code section 96.3-7. In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

**DECISION:**

The April 15, 2013, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as 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. The claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

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Julie Elder  
Administrative Law Judge

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Decision Dated and Mailed

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