

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**CRYSTAL WARD**

Claimant

**APPEAL NO: 13A-UI-05299-ET**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CARE INITIATIVES**

Employer

**OC: 04/07/13**

**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 25, 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 7, 2013. The claimant participated in the hearing. Ryan Lamore, Administrator; Heidi Roland, Dietary Services Manager; Rachel, Dietary Aide; Jeanne Alexander, DON; and Toni Kerr, Employer's Representative, 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 part-time dietary cook, dietary aide, laundry person and housekeeper for Care Initiatives from January 22, 2011 to April 7, 2013. She was discharged for theft of food from the employer.

Under the employer's policy, any leftover food that cannot be used for another meal must be thrown away. Employees are never allowed to take food home and are only allowed to eat food from the kitchen if they pay for a \$4.00 guest meal or it is a special occasion. Around March 21, 2013, Dietary Aide Rachel Maki observed the claimant taking a gallon size zip lock bag containing three sandwiches and two cookies home. Ms. Maki did not report the incident because the claimant was her supervisor and she did not think much about the situation at the time.

On March 28, 2013, the employer served residents shrimp and French fries for dinner. Ms. Maki was looking for trash bags and asked the claimant where they were. Ms. Maki looked on a cart located near the pantry and noticed a towel covering something lumpy underneath. She removed the towel and found a quart size zip lock bag filled with shrimp and fries. The claimant saw Ms. Maki find the bag and stated she was taking it home to her son because she

did not like shrimp. One of the residents who ordered shrimp for dinner did not get his plate because the kitchen ran out of shrimp. Consequently, he had to settle for a hot dog the claimant made for him.

On April 4, 2013, Ms. Maki reported the incidents to the dietary cook and she in turn informed Administrator Ryan Lamore. Mr. Lamore met with Ms. Maki around 5:00 p.m. that evening and she described seeing the claimant remove food from the kitchen on two occasions. Mr. Lamore began his investigation April 5, 2013, and asked the claimant to come in and meet with him on that date but she was unable to do so at the time requested so they met April 6, 2013. He asked her about the allegations, which were denied by the claimant, and then suspended her pending further investigation. Mr. Lamore met with Ms. Maki again and she repeated her observations in the same manner as the first time she described what she saw and on April 7, 2013, he held a second interview with the claimant. He asked her why there was food in the cart by the pantry, why the kitchen ran short on shrimp March 28, 2013, why she made a hot dog for a resident who did not get the shrimp he ordered and why someone would make these allegations and the claimant denied all of the accusations. Mr. Lamore felt the claimant was not forthcoming while Ms. Maki did not have anything to gain by reporting these incidents and as a result he could no longer trust the claimant. The employer terminated the claimant's employment April 7, 2013, for theft of company property.

The claimant has claimed and received unemployment insurance benefits since her separation from this employer.

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

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job 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 employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Ms. Maki's testimony was credible in describing the claimant's actions in taking the sandwiches and cookies around March 21 and the shrimp and French fries March 28, 2013. The claimant even commented on both occasions she was taking the food home to her son and volunteered she did not like shrimp. Additionally, the zip lock bag containing the shrimp and fries was covered with a towel, demonstrating the claimant attempted to hide what she was doing from Ms. Maki and indicating the claimant knew her actions violated the employer's policy prohibiting employees from taking any food home, whether it was leftover and going to be thrown away or not. The claimant had not purchased a \$4.00 guest meal on either occasion. The claimant's actions prevented a resident from getting the shrimp and fries he ordered and instead the claimant made him a hot dog, even though she denied any knowledge of any of these events. The claimant committed theft from the employer by taking the sandwiches, cookies, shrimp and fries. 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 25, 2013, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she 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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