

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LYNDSEY P LAMB
Claimant

APPEAL NO. 12A-UI-02525-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

FOODS INC
Employer

OC: 01/29/12
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed an appeal from a decision of a representative dated March 5, 2012, reference 01, which held that the claimant was eligible to receive unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on March 29, 2012. Claimant participated. The employer participated by Joe McDonald, store director Johnson. The record consists of the testimony of Joe McDonald; the testimony of Lyndsey Lamb; and Employer's Exhibits One and Two.

ISSUE:

Whether the claimant was discharged for misconduct.

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 is a retail grocery store located in Johnston, Iowa. The claimant was hired on June 12, 2010, as a part-time cashier. The claimant's last day of work was January 27, 2012. She was terminated on January 27, 2012.

The incident that led to the claimant's termination occurred on January 27, 2012. The claimant had a fifteen minute break and wanted something to eat. She got a sandwich from the store and looked around for someone so that she could pay for it. All of the other employees were busy with customers. The claimant decided to quickly eat the sandwich and then pay for it. The sandwich was worth less than \$7.00.

The employer has a written policy that requires that all food purchases be paid for prior to use. The claimant did read the handbook but she did not know the meaning of the word prior. The claimant had never been disciplined in the past for taking items without paying for them first.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. The legal definition of misconduct excludes errors of judgment or discretion in isolated situations. The employer has the burden of proof to show misconduct.

Employers can reasonably expect that employees will not take merchandise that is the employer's property without paying for it. In this case, the claimant ate a sandwich before paying for it. She did pay for the sandwich after she ate it. The claimant testified that she only had fifteen minutes for her break and no employee was available when she took the sandwich. She decided to eat the sandwich first and then pay for it. The administrative law judge

concludes that the claimant did not intend to steal the sandwich. Rather she made an error of judgment by not paying for the sandwich first. She did so because all of the employees were busy helping customers.

Misconduct requires intent on the part of the claimant to breach a material duty to the employer. The claimant did violate store policy, but her conduct does not show the requisite intent on her part to steal the sandwich or deliberately violate store policy. Under these circumstances, there is insufficient evidence to show disqualifying misconduct. Benefits are allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated March 5, 2012, reference 01, is affirmed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs