

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

PAMELA D LUMSDEN
Claimant

APPEAL NO. 11A-UI-12502-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FOOE
Employer

OC: 08/07/11
Claimant: Respondent (2-R)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, FOOE, filed an appeal from a decision dated September 14, 2011, reference 01. The decision allowed benefits to the claimant, Pamela Lumsden. After due notice was issued, a hearing was held by telephone conference call on October 17, 2011. The claimant did not provide a telephone number where she could be contacted and did not participate. The employer participated by Former Chairman of the Board Jack Henninger, Trustee Ronny Fike and Bartender Peggi Johnson.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Pamela Lumsden was employed by FOOE from August 2010 until March 22, 2011 as a part-time bartender. At the time of hire she asked Secretary John Lenius if it was okay for the bartenders to “borrow” from the “bag,” which is where the shift’s revenue is placed before counting. She was told no.

The bartender bags are counted on Tuesdays and Thursdays by the trustees. On March 22, 2011, Ms. Lumsden called Mr. Lenius in the early afternoon and asked that her bag not be counted until she arrived and he agreed. But because he considered this a “red flag” he and Bartender Peggi Johnson counted Ms. Lumsden’s bag and found it \$200.00 short. The bag was placed back in the safe where the claimant had originally left it.

After Ms. Lumsden arrived the bag was counted by the trustees and it balanced. They questioned the claimant and asked her to explain why the bag was \$200.00 short before she arrived but balanced afterward. She maintained her daughter had written a check for \$200.00, which Ms. Lumsden then replaced with two, one hundred dollar bills. No check had been in the bag when it was counted earlier by Mr. Lenius. When asked where the check was she said she had torn it up and thrown it out. She was sent back to the bar with one of the trustees to find the check but it was not there. The trash had not been emptied that day.

Former Chairman of the Board Jack Henninger spoke on behalf of the trustees and asked for her keys and told she was discharged for theft.

Pamela Lumsden has received unemployment benefits since filing a claim with an effective date of August 7, 2011.

REASONING AND CONCLUSIONS OF LAW:

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 was discharged for theft of the employer's revenue. The fact she may have replaced it does not mitigate the fact she took money which did not belong to her and without permission. She lied when questioned about the reason the bag was short originally but then balanced when counted when she showed up for work. In order to be disqualified from unemployment benefits for a single incidence of misconduct, the misconduct must be a deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees. *Henry v. IDJS*, 391 N.W.2d 731 (Iowa App. 1986). The administrative law judge considers the claimant's conduct to rise to this level of substantial misconduct and she is disqualified.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

The claimant has received unemployment benefits to which she is not entitled. The question of whether the claimant must repay these benefits is remanded to the UIS division.

DECISION:

The representative's decision of September 14, 2011, reference 01, is reversed. Pamela Lumsden is disqualified and benefits are withheld until she has earned ten times her weekly benefit amount in insured work, provided she is otherwise eligible. The issue of whether the claimant must repay the unemployment benefits is remanded to UIS division for determination.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/css