

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

PATRICIA L HAINES
Claimant

**LENIHAN INC
DRIFTWOOD INN**
Employer

APPEAL NO: 12A-UI-00354-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 12/04/11
Claimant: Respondent (2-R)**

Section 96.5-2-a – Discharge
871 IAC 24.32(1) – Definition of Misconduct
Section 96.3-7 – Recovery of Overpayment

STATEMENT OF THE CASE:

The employer appealed a department decision dated January 6, 2012, reference 01, that held the claimant was not discharged for misconduct on December 3, 2011, and benefits are allowed. A telephone hearing was held on February 8, 2012. The claimant, and Attorney, Aaron Rodenburg, participated. David Poor, Attorney, Roberta Lenihan, Tom Lenihan, Co-Owners, Wayne Jorgenson, Duane Haines, and Sheri Rivera, customers, participated for the employer.

ISSUE:

Whether the claimant was discharged for misconduct in connection with employment.

FINDINGS OF FACT:

The administrative law judge having heard the testimony of the witnesses, and having considered the evidence in the record, finds: The claimant continued employment when the employer purchased the business on February 12, 2004, and last worked for the employer as a full-time bartender on December 3. The employer discharged claimant for theft and other reasons on December 7. In this hearing, claimant acknowledges the employer said one of the reasons for discharge was mishandling money.

The employer had received some customer reports that claimant had been “short-changing” the business. Claimant made statements to customers that she was allowed to take funds when her register count was long. One customer observed claimant taking money from a customer and putting the money in her tip jar. Customer Jorgenson reported to Co-Owner Roberta Lenihan on December 3 that he observed claimant put three \$20 bills from the register into her tip jar. Lenihan watched claimant based on the customer report and she observed claimant taking additional funds for her personal use.

Claimant has received unemployment benefits on her current claim. Claimant acknowledged the employer told her she was discharged for mishandling money.

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.

The administrative law judge concludes the employer has established claimant was discharged for misconduct in connection with employment on December 7, 2011 for theft of cash.

The employer offered customer witnesses to corroborate direct owner observation that claimant was taking money from the business on more than one occasion. The employer established a current act of misconduct on December 3 when an owner observed claimant taking money after a customer report she was doing so that day that constitutes job disqualifying misconduct.

Since claimant had received no prior discipline for any issue, the other employer reasons for discharge were not considered.

Iowa Code § 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.

Since claimant has been disqualified by this decision while receiving unemployment benefits, the overpayment issue is remanded to claims for a decision.

DECISION:

The department decision dated January 6, 2012, reference 01, is reversed. The claimant was discharged for misconduct on December 7, 2011. Benefits are denied until the claimant requalifies by working in and being paid wages for insured work equal to ten times her weekly benefit amount, provided the claimant is otherwise eligible. The overpayment issue is remanded.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/pjs