

**IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI**

**MARY B BOYD
221 S SCHUYLER
OTTUMWA IA 52501**

**FISHERMAN'S BAY INC
D/B/A FISHERMAN'S BAY
221 N WAPELLO
OTTUMWA IA 52501**

**Appeal Number: 05A-UI-06901-RT
OC: 06-12-05 R: 03
Claimant: Respondent (2)**

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Fisherman's Bay, Inc., doing business as Fisherman's Bay, filed a timely appeal from an unemployment insurance decision dated June 29, 2005, reference 01, allowing unemployment benefits to the claimant, Mary B. Boyd. After due notice was issued, a telephone hearing was held on July 21, 2005, with the claimant not participating. The claimant did not call in a telephone number, either before the hearing or during the hearing, where she or any of her witnesses could be reached for the hearing, as instructed in the notice of appeal. James Palen, Owner; David Lippert, Cook; and Kenneth N. Chrisman, Server, participated in the hearing for the employer. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a part-time server from June 26, 2003 until she was discharged on May 3, 2005. The claimant had been previously employed by the employer prior to June 26, 2003. The claimant was discharged for theft of a customer coat and for consuming food of the employer without paying for it. On May 2, 2005, a customer left his coat in the employer's restaurant. The coat was placed in the office of the employer's witness, James Palen, Owner. Mr. Palen called the customer to come in and get his coat. The only other person in the office besides Mr. Palen was the claimant when she was making copies. The claimant was in the office by herself. When the customer came by to get the coat no one could find it. The coat was not in the office or anywhere else that the employees looked. At that time the claimant was not there. The employer has a cabinet where personal belongings of the employees are kept. Employees of the employer looked in that cabinet but did not find the coat in question. Mr. Palen called the claimant about the coat and the claimant's story changed three times. In any event the claimant came in the next day to help look for the coat and opened the cabinet where the employees' belongings were kept and found the coat. Mr. Palen had just checked that cabinet shortly before the claimant arrived and the coat was not in the cabinet. The claimant was then discharged.

Concerning the consuming of food without paying for it; the employer has a policy that requires that employees pay for food they consume. The employees do get a 50 percent discount but are expected to pay the other 50 percent. The claimant consumed food of the employer without paying for it and conceded to Mr. Palen that she had done so. The claimant was discharged for this as well. The claimant was incarcerated between February 8, 2005 and March 4, 2005 but the employer allowed the claimant to come back to work and the claimant worked until she was discharged on May 3, 2005. Pursuant to her claim for unemployment insurance benefits filed effective June 12, 2005, the claimant has received unemployment insurance benefits in the amount of \$484.00 as follows: \$121.00 per week for four weeks from benefit week ending June 18, 2005 to benefit week ending July 9, 2005.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was.
2. Whether the claimant is overpaid unemployment insurance benefits. She is.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The employer's main witness James Palen, Owner, credibly testified, and the administrative law judge concludes, that the claimant was discharged on May 3, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct.

The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. Mr. Palen credibly testified that a customer's coat was left in his restaurant and placed in his office. He called the customer to come in and get the coat. Mr. Palen left the office and the only other employee to gain entrance into his office was the claimant, when she was making copies. When the guest arrived to get his coat, the customer's coat was not in the office. Mr. Palen called the claimant to inquire about the coat and the claimant's story changed three times. Employees looked everywhere for the coat including the cabinet where employees keep their personal belongings but did not find the coat. The claimant came in the next day, May 3, 2005 and found the coat in the cabinet where the employees' belongings are kept. Mr. Palen had just checked that cabinet before the claimant had arrived and did not see the coat in the cabinet. The only possible person to have taken the coat was the claimant. The claimant was then discharged. On the record here, and in the absence of any evidence to the contrary, the administrative law judge must conclude that the claimant took the customer's coat and then returned it when the loss of the coat was noted. The administrative law judge further concludes that this was a deliberate act or omission constituting a material breach of her duties and obligations arising out of her worker's contract of employment and evinces a willful or wanton disregard of the employer's interest and is disqualifying misconduct. Mr. Palen also credibly testified that the claimant ate food of the employer without paying for it. The employer has a policy that provides that employees get a 50 percent discount on food consumed on the employer's premises while at work but they must pay the other 50 percent. The claimant was consuming food that she had not paid for and even

conceded as much to Mr. Palen. In the absence of any evidence to the contrary, the administrative law judge also concludes that this was a deliberate act or omission by the claimant constituting a material breach of her duties and evincing a willful or wanton disregard of the employer's interest and was disqualifying misconduct.

In summary, and for all the reasons set out above, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct and, as a consequence, she is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant, until or unless, she requalifies to receive such unemployment insurance benefits.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$484.00 since separating from the employer herein on or about May 3, 2005 and filing for such benefits effective June 12, 2005. The administrative law judge further concludes that the claimant is not entitled to these benefits and is overpaid such benefits. The administrative law judge finally concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of June 29, 2005, reference 01, is reversed. The claimant, Mary B. Boyd, is not entitled to receive unemployment insurance benefits, until or unless she requalifies for such benefits, because she was discharged for disqualifying misconduct. She has been overpaid unemployment insurance benefits in the amount of \$484.00.

dj/pjs