

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**ROY V TORRES**  
Claimant

**APPEAL NO. 12A-UI-00488-HT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**NOAH'S INC**  
Employer

**OC: 05/12/11  
Claimant: Respondent (1)**

Section 96.5(2)a – Discharge

**STATEMENT OF THE CASE:**

The employer, Noah's, filed an appeal from a decision dated January 4, 2012, reference 03. The decision allowed benefits to the claimant, Roy Torres. After due notice was issued, a hearing was held by telephone conference call on February 17, 2012. The claimant participated on his own behalf. The employer participated by Cashier David Turcott and Office Manager Gary Baker.

**ISSUE:**

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

**FINDINGS OF FACT:**

Roy Torres was employed by Noah's from July 19 until December 8, 2011 as a part-time server. The employer pays cash to the servers for any tips they have received during their shift which were charged on a credit card by the customer. An automated system adds the tips for each server and the manager then pays out that amount.

On November 26, 2011, the cashier incorrectly entered the amount of the tip in error, so that instead of \$20.00 as a gratuity, he put in \$200.00. The error was discovered after the claimant went home and the shift manager was reconciling the finances.

The shift manager notified the claimant on November 28, 2011 and asked him to repay the amount. He agreed to do so but had to do it in increments as he had already spent the amount of the cash tips. The repayment was complete on December 5, 2011, and he was discharged by the owner on December 8, 2011. The employer felt it could not trust his honesty. The employer felt Mr. Torres should have known his tips did not amount to that much and accepted the cash from the supervisor in bad faith. The decision was made not to discharge him until he had completely repaid the overage

## 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.

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.

The employer has the burden of proof to establish the claimant was discharged for substantial, job-related misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). In the present case there is no dispute over the facts. The claimant accepted more money in cash tips than he had earned but there has been no proof that he actually knew the amount he should have received after his shift.

The employer does not dispute the claimant paid the money back in full. He was discharged after the employer received the full payment. If the employer did not trust his honesty, and that is the reason for the discharge, he should have been fired immediately after it was discovered he had accepted the tip money in error. The fact the employer waited to make sure it got its money may be a business decision but it places the discharge 12 days after the error was discovered. The administrative law judge determines this puts the matter beyond a "current act

of misconduct” as required by the provisions of the above Administrative Code section. In addition, there is no proof of a willful and deliberate act of accepting money to which he was not entitled. Disqualification may not be imposed.

**DECISION:**

The representative’s decision of January 4, 2012, reference 03, is affirmed. Roy Torres is qualified for benefits, provided he is otherwise eligible.

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Bonny G. Hendricksmeier  
Administrative Law Judge

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Decision Dated and Mailed

bgh/css