

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARY M MURRAY
Claimant

APPEAL NO. 07A-UI-09383-SWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ABM LTD
Employer

**OC: 09/02/07 R: 01
Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

The employer appealed an unemployment insurance decision dated September 26, 2007, reference 01, that concluded the claimant's discharge was not for work-connected misconduct. A telephone hearing was held on October 22, 2007. The parties were properly notified about the hearing. The claimant participated in the hearing. Joe Johnson participated in the hearing on behalf of the employer with witnesses, Greg Stearns and Tara Swackhammer. Exhibit One was admitted into evidence at the hearing.

ISSUES:

Was the claimant discharged for work-connected misconduct?

Was the claimant overpaid unemployment insurance benefits?

FINDINGS OF FACT:

The claimant worked full time as a day maid for the employer from November 24, 1997, to August 17, 2007. She was assigned to work at the AvivaUSA location. The claimant was informed and understood that under the employer's work rules, theft was grounds for discharge. She had received a warning on November 9, 2006, for misrepresenting her hours worked when she left the work premises for personal business without clocking out.

During the first week of August 2007, the claimant was observed by the cafeteria staff getting breakfast from the cafeteria without paying for it. When the cafeteria staff talked to the claimant, she apologized and said it would not happen again.

On August 16, 2007, the claimant took hash browns from the serving area and ate them without paying for them. When confronted about it by the cafeteria manager, she admitted that she had not paid for the food but intended to pay for it the next day. The claimant later claimed that she had made an arrangement with the cashier to pay for the food the next day, but this is untrue.

The employer was informed about the incidents of taking food without paying for it on August 16, 2007, and discharged the claimant for theft of property on August 17.

The claimant filed for and received a total of \$1,158.00 in unemployment insurance benefits for the weeks between September 2 and October 20, 2007.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance 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 findings of fact show how I resolved the disputed factual issues in this case by carefully assessing of the credibility of the witnesses and reliability of the evidence and by applying the proper standard and burden of proof. The claimant's testimony that August 16 was the first time she had taken food without paying for it and that she had made an arrangement with the cashier to pay for the hash browns the next day is not credible. First, the claimant admits she committed an offense involving dishonesty in November 2006, which reflects on her credibility. Second, I find it difficult to believe that the cafeteria manager would make up the fact that the claimant had been previously caught taking food without paying for it, had apologized, and said it would not happen again. Third, the claimant's explanation that she had talked to the cashier about buying some hash browns and paying for them the next day is illogical. Unless the

claimant approached the cashier after getting her food, the cashier would have no idea what the claimant had taken in order to make sure that she paid for her items the next day. It is a rare instance when hearsay evidence outweighs direct testimony, but in this case the claimant's own testimony is not believable.

The claimant's violation of a known work rule was a willful and material breach of the duties and obligations to the employer and a substantial disregard of the standards of behavior the employer had the right to expect of the claimant. Work-connected misconduct as defined by the unemployment insurance law has been established in this case.

The next issue in this case is whether the claimant was overpaid 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.

As a result of this decision, the claimant is disqualified from receiving unemployment insurance benefits and was overpaid \$1,158.00 in unemployment insurance benefits for the weeks between September 2 and October 20, 2007.

DECISION:

The unemployment insurance decision dated September 26, 2007, reference 01, is reversed. The claimant is disqualified from receiving unemployment insurance benefits until she has been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The claimant was overpaid \$1,158.00 in unemployment insurance benefits, which must be repaid.

Steven A. Wise
Administrative Law Judge

Decision Dated and Mailed

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