

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**SENIJA HODZIC**  
Claimant

**APPEAL NO. 09A-UI-04915-M**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**PRAIRIE MEADOWS RACETRACK  
& CASINO INC**  
Employer

**OC: 03/01/09**  
**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Claimant filed an appeal from a decision of a representative dated March 18, 2009, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on April 29, 2009. Claimant participated personally and was represented by Jeff Carter, Attorney at Law. Sanel Terzic acted as the Bosnian interpreter. Employer participated by Tracey Casey, Human Resource Generalist. Exhibits One, Two and Three were admitted into evidence.

**ISSUE:**

The issue in this matter is whether claimant was discharged for misconduct.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant last worked for employer on February 27, 2009.

Claimant was discharged on February 27, 2009 by employer because claimant helped a coworker take some baked goods on February 10, 2009 and February 14, 2009. Claimant also watched a coworker take some baked goods from the kitchen on February 17, 2009, February 20, 2009 and February 21, 2009. The value of the baked goods totals a few dollars. This taking of baked goods by coworkers and supervisors had been going on for years. Once prior, managers put a stop to it, but it started again soon after. The coworker's entry into the kitchen so often put the managers on notice of this conduct. Claimant just went along with it as she did not feel comfortable confronting the coworkers. Claimant does not speak English very well as she is a Bosnian immigrant. Employer has a theft policy that calls for discipline up to and including discharge on the first offense. Claimant was observed giving the baked goods out and watching the baked goods taken by a coworker on five video tapes. The tapes were not offered as exhibits because the employer has a policy which prohibits such release without receipt of a subpoena. Claimant did not steal any of the baked goods. Claimant did not benefit from the taking of the baked goods in any way.

## 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 gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation.

In this matter, the evidence fails to establish that claimant was discharged for an act of misconduct when claimant violated employer's policy concerning theft. Claimant was warned concerning this policy.

The last incident, which brought about the discharge, fails to constitute misconduct because claimant did not steal anything. Claimant stood by and let other employees take some baked goods. Claimant had reported this policy before with no permanent action by management. Claimant did not want to be rude to the coworkers who were taking the baked goods. This is

not theft. It is, at best, poor judgment on claimant's part. She passively let this taking of baked goods happen. Claimant is no more guilty of this than the managers who allowed this to go on for years. Claimant's lack of ability to speak English fluently is also a mitigating factor as claimant was obviously uncomfortable reporting the taking of left overs. The administrative law judge holds that claimant was not discharged for an act of misconduct and, as such, is not disqualified for the receipt of unemployment insurance benefits.

**DECISION:**

The decision of the representative dated March 18, 2009, reference 01, is reversed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

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Marlon Mormann  
Administrative Law Judge

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Decision Dated and Mailed

mdm/pjs