

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SUSAN BEACH BORCHERDING

Claimant

APPEAL NO: 12A-UI-13334-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

IA DEPT OF JUDICIAL ADMINISTRATION

Employer

OC: 10/07/12

Claimant: Appellant (1)

Iowa Code § 96.5(2)(a) - Discharge for Misconduct

STATEMENT OF THE CASE:

Susan Beach Borcharding (claimant) appealed an unemployment insurance decision dated October 25, 2012, reference 01, which held that she was not eligible for unemployment insurance benefits because she was discharged from the Iowa Department of Judicial Administration (employer) for work-related misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on December 5, 2012. The claimant participated in the hearing. The employer participated through Beth Baldwin, District Court Administrator for the Fifth District; Mare Steil, District Finance and Personnel Manager; and Ken Kjer, Employer Representative. Employer's Exhibits One through Three were admitted into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

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

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was employed as a full-time judicial clerk from March 7, 1989 through October 4, 2012 when she was discharged for violating her last-chance agreement. She was placed on administrative leave on February 9, 2011 for admittedly using alcohol at work and she returned to work on approximately April 4, 2011. The claimant signed a Last Chance Employment Agreement on March 2, 2011 wherein she understood and agreed that if she reported to work under the influence of alcohol, she would face immediate discharge. The claimant promised in the Agreement to "abstain completely from the use of alcohol for the remainder of her employment with the Iowa Judicial Branch." The union agreed to these conditions and the claimant's discharge in violation of this agreement would not be subject to a grievance under the Collective Bargaining Agreement.

The claimant violated this Agreement by reporting to work numerous times in August and September 2012 after having recently consumed alcohol. There was a "strong, overpowering smell of alcohol" coming from her on September 21, 2012. Additionally, she reported to work

after consuming alcohol on September 25 and 26, 2012. Numerous witnesses smelled a strong odor of alcohol emanating from her “breath, person, and clothes” on the above-mentioned dates. The claimant was placed on administrative leave on September 26, 2012 relating to possible violations of the Iowa Judicial Branch Personnel Policies 1.8 – Drug Free Workplace; 2.1 Office Hours; 5.4 Sick Leave Policy; 7.1 Disciplinary Actions; 10.2 (1), (2), (3) and (4) Attendance and Punctuality; 10.3 (5), (6) and (7) Personal Actions and Appearances and 10.5 (2) and (3) Work Performance. While on administrative leave, the claimant was required to be available by telephone and available to report to work within one hour of being notified to do so.

An investigatory meeting was held with the claimant on September 27, 2012. District Court Administrator Elizabeth Baldwin and District Finance and Personnel Manager Mare Steil both personally smelled alcohol on her breath during the interview. The employer determined the claimant violated her Last Chance Employment Agreement, as well as Judicial Branch Personnel Policies 1.8 Drug Free Workplace; 7.1 Disciplinary Actions regarding unrehabilitated alcoholism and dishonesty; and Personal Actions and Appearances, 10.3.7 – *“Employees shall not report to work in a condition which is unsafe for the employee, others or physical property, or a condition which renders one incapable of performing job responsibilities, or a condition which creates an unfavorable public image. Such conditions include, but are not limited to....being under the influence of alcohol...”*

The employer issued a termination letter dated September 28, 2012, which stated, “We have no other choice but to conclude that you reported to the Investigatory Interview having recently consumed alcohol and thus under the influence of alcohol. Your use of alcohol, reporting to work having consumed alcohol and being under the influence of alcohol is a direct violation of your Last Chance Agreement, as well the work rules stated above.” The claimant remained on Administration Leave until the close of business on October 4, 2012 at which time her employment was terminated.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a.

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 employer has the burden to prove the discharged employee is disqualified for benefits due to work-related misconduct. *Sallis v. Employment Appeal Bd.*, 437 N.W.2d 895, 896 (Iowa 1989). The claimant was discharged on October 4, 2012 for violation of her Last Chance Employment Agreement and violation of Judicial Branch Personnel Policies 1.8 Drug Free Workplace; 7.1 Disciplinary Actions regarding unrehabilitated alcoholism and dishonesty; and Personal Actions and Appearances, 10.3.7. She denied consuming alcohol but numerous employer witnesses smelled a strong odor of alcohol emanating from the claimant's breath, person and clothes on numerous days but in particular on September 21, 25 and 26, 2012. Additionally, both employer witnesses smelled alcohol on her breath during the final investigatory meeting on September 27, 2012.

Iowa Code § 730.5 sets forth the rules by which a private company may screen its employees for use of illegal drugs or alcohol but this code section is not applicable to a public employer. However, it should be noted that the claimant was terminated based upon the fact that she consumed alcohol prior to work and not on the amount of alcohol she consumed. While she continues to deny this, the preponderance of the evidence confirms she did in fact consume alcohol before reporting to work. Her actions were in violation of her last-chance agreement and company policy. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

DECISION:

The unemployment insurance decision dated October 25, 2012, reference 01, is affirmed. The claimant is not eligible to receive unemployment insurance benefits because she was discharged from work for misconduct. Benefits are withheld until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/css