

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

PAUL A HEITMAN
Claimant

APPEAL NO: 10A-UI-03309-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

IOC SERVICES LLC
Employer

OC: 01/24/10

Claimant: Respondent (2/R)

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

STATEMENT OF THE CASE:

IOC Services, L.L.C. (employer) appealed a representative's February 22, 2010 decision (reference 01) that concluded Paul A. Heitman (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 20, 2010. The claimant participated in the hearing. Stacey Hall, attorney at law, appeared on the employer's behalf and presented testimony from five witnesses, David Taylor, Kaywin Jaramillo, Carissa Martin, John Stanford, Sr., and Norman Smith. During the hearing, Employer's Exhibits One through Four and Claimant's Exhibit A were entered 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:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on June 2, 2008. He worked full time as a lead security officer on the second shift at the employer's Waterloo, Iowa casino. His last day of work was January 19, 2010. The employer discharged him on January 20, 2010. The stated reason for the discharge was not performing his duties as instructed with regard to dealing with intoxicated patrons after prior warnings.

On January 16 at about 7:00 p.m. a server expressed concern to Ms. Jaramillo, the senior casino attendant, and Ms. Martin, the casino service shift manager, that a patron playing the slots and consuming beer might be intoxicated, as she seemed a "bit more cross-eyed" than normal and she had a history of over-consumption. The employer is prohibited by law from serving alcohol to an intoxicated patron or allowing an intoxicated patron to continue gambling. As a result, Ms. Jaramillo and Ms. Martin followed the employer's procedure by summoning security; the claimant is the officer who responded. He observed the patron from a distance for

a few minutes. He did not approach the patron or engage the patron in conversation. He then left the area, indicating that the server could proceed to serve the patron another beer.

Within a short time, as Ms. Jaramillo and Ms. Martin continued to monitor the patron, it became apparent to them that the patron was uncoordinated and unable to stand without support. They summoned the security supervisor, who came and approached the patron. The security supervisor detected the patron was slurring her words and was clearly intoxicated; the patron was then escorted to the casino lobby area. The patron subsequently was taken into custody by a division of criminal investigations (DCI) agent at about 8:00 p.m. The employer asserted that the claimant failed to carry out his duties as instructed because he failed to directly approach and assess the patron when he was first summoned at about 7:00 p.m.

The employer's policies, under the heading "**Security:**" (bold original), require that "[e]very team member of the Security Staff will be trained to effectively assess and approach any guest who shows obvious signs of intoxication . . ." Upon notification of a possibly intoxicated guest, the lead officer "shall immediately respond to the guest location along with another officer to monitor the guest's actions for a short period of time to help with the final intoxication assessment . . ." The lead officer is to "approach the guest to finish the evaluation by asking them to step away from other guests for privacy. At this point Security will make a judgment by evaluating the guest['s] Inhibitions, Judgment, Reactions and Coordination. If it is deemed the guest is not obviously intoxicated they will be allowed to continue to gamble. If it is deemed the guest is obviously intoxicated they will be asked to leave the premises with a Security escort." The employer asserts the claimant failed to comply with these procedures because he did not make an approach to directly assess the patron as required.

The claimant relies on subsequent portion of the employer's policy in which standards of evaluating a guest for visible intoxication are set out, including observations as to inhibitions, judgment, reactions, and coordination. "Based on these observations, the authorized team member[s] will determine whether to approach the guest, or whether the guest is showing no significant signs of intoxication and should just be watched." (Underline added.) The claimant asserts that when he was contacted, his only responsibility was to make these observations from a distance and then make a determination as to "whether to approach," and that as his observations from a distance did not indicate to him clear problems with the patron's inhibitions, judgment, reactions, and coordination, he therefore found no significant signs of intoxication, and therefore an "approach was not warranted.

This portion of the employer's policy goes on to state, "TIPS trained Directors, Managers, Supervisors and Leads . . . can assist in making a determination if a guest needs to be approached." The next paragraph specifies, "**Approaches need to be completed by a Security Lead/Supervisor unless they are unavailable.** (Bold original.) If a Security Lead/Supervisor is unavailable a Beverage Supervisor, Slot Shift manager or Pit Manager can be called upon to assist. . ."

The lead-in to the section relied upon by the claimant is a bold faced paragraph, "**Bartenders/Servers are directly liable, by law, for the responsible service of alcohol, and therefore have the authority to refuse service to possibly intoxicated guests. Anytime service is refused, it must be brought to the attention of their immediate supervisor.**" (Underline original.) The next paragraph is headed, "**Visibly Intoxicated Guests:**" (bold original) and continues, "Despite our best efforts, we may find guests that have reached the point of intoxication. **Any** team member who notices signs of visible intoxication must notify their lead/supervisor immediately. " (Bold and underline original.) . . . This is then followed by

the standards referred to by the claimant for evaluating intoxication to determine whether an “approach” is warranted.

The claimant had been subject to numerous counselings from at least the security manager, Mr. Taylor, as well as the assigned DCI agent, regarding the need to properly comply with the requirement to make an approach to directly assess a potentially intoxicated patron, including a suspension on September 3, 2009 at least in part for failing to properly approach intoxicated guests and for failing to ask questions and seek guidance from his supervisors. On December 14, 2009 he was placed on a performance improvement plan because the employer had “not seen improvement in these areas and to communicate to you that you must correct these deficiencies in order to improve both as a Supervisor and coworker.” The plan specified, “Progress in all of the areas listed above must be immediate and ongoing. Failure to do so will result in disciplinary action up to and/or including termination of your employment. .” The incident with the intoxicated patron then occurred on January 16, 2010.

The claimant established a claim for unemployment insurance benefits effective January 24, 2010. The claimant has received unemployment insurance benefits after the separation.

REASONING AND CONCLUSIONS OF LAW:

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. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982); Iowa Code § 96.5-2-a.

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The claimant's reliance on the general language of the employer's policy regarding making an evaluation as to whether to approach is clearly misplaced. The entire context of that provision deals with persons other than security and is for the purpose of assisting those other persons in determining whether an approach is necessary; if so, that portion of the policy is clear that the next step is to contact security, so that security can do the approach. The claimant chooses to ignore the specific portion of the policy clearly establishing what the specific duty of the security officer is once the officer has been summoned by an authorized person indicating a possibly intoxicated guest. The administrative law judge finds the claimant's reading of the policy as it applies to his situation wholly indefensible. Further, given his prior warnings and counselings on

the same subject, it is implausible that the claimant could have sincerely believed that the standard that applied to him as a security office was the standard that applied to general/non-security team members who might encounter a potentially intoxicated guest.

The claimant's failure on January 16, after prior warning, to approach the patron and speak privately to the patron to make a direct evaluation upon being summoned by a report of a potentially intoxicated patron, shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. The employer discharged the claimant for reasons amounting to work-connected misconduct.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code § 96.3-7. In this case, the claimant has received benefits but was ineligible for those benefits. The matter of determining the amount of the overpayment and whether the claimant is eligible for a waiver of overpayment under Iowa Code § 96.3-7-b is remanded the Claims Section.

DECISION:

The representative's February 22, 2010 decision (reference 01) is reversed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of January 19, 2010. This disqualification continues until the claimant has been paid ten times his weekly benefit amount for insured work, provided he is otherwise eligible. The employer's account will not be charged. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue and whether the claimant is eligible for a waiver of any overpayment.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs