

IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI

KENNETH L BURNSIDES  
3144 AVE K  
COUNCIL BLUFFS IA 51501-0783

HARVEYS BLUFFS RUN MANAGEMENT  
COMPANY INC  
HARVEYS CASINO RESORTS  
2701 – 23<sup>RD</sup> AVE  
COUNCIL BLUFFS IA 51501

Appeal Number: 06A-UI-02903-S2T  
OC: 02/05/06 R: 01  
Claimant: Appellant (1)

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4<sup>th</sup> Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Kenneth Burnside (claimant) appealed a representative's February 27, 2006 decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits because he was discharged from work with Harvey's Casino Resorts (employer) for violation of a known company rule. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 30, 2006. The claimant participated personally. The employer did not provide a telephone number where it could be reached and, therefore, did not participate.

#### 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 hired on June 23, 1999, as a full-time drop team supervisor. In approximately the year 2000, the employer issued the claimant a warning for smelling of alcohol on the job. The employer had a handbook concerning alcohol and drug issues.

On October 10, 2005, the employer smelled alcohol on the claimant's breath. The claimant refused to go to the hospital for a urine test. He agreed to a breathalyzer test and blew a concentration of 0.063, which showed the claimant had some amount of alcohol in his system. The claimant admitted that he drank eight or nine cans of beer per day. On October 9, 2005, the claimant had his last drink around 2:00 p.m. He went to work at 1:00 a.m. on October 10, 2005. The breathalyzer test was administered at approximately 2:30 a.m.

The employer suspended the claimant on October 10, 2005, and later terminated him for working while under the influence of alcohol. The claimant sought treatment on December 27, 2005, and has not had any alcohol since that date. He was released from treatment on February 8, 2006.

#### REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant was discharged for misconduct. For the following reasons the administrative law judge concludes he was.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Consumption of alcohol on the job following warning constitutes job misconduct where the claimant checked into an alcohol abuse program after the discharge and stopped drinking, showing that his actions were volitional. Ayersman v. Iowa Department of Job Service, 417 N.W.2d 466 (Iowa 1988). An employer has a right to expect employees to conduct themselves in a certain manner. The claimant disregarded the employer's right by being under the influence of alcohol while on the job. The claimant's conduct was volitional. His disregard of the employer's interests is misconduct. As such, he is not eligible to receive unemployment insurance benefits.

#### DECISION:

The representative's February 27, 2006 decision (reference 01) is affirmed. The claimant is not eligible to receive unemployment insurance benefits because he was discharged from work for misconduct. Benefits are withheld until he has worked in and has been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

bas/kkf