

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

STUART W ATHA
Claimant

APPEAL NO. 08A-UI-03145-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FT DODGE DISTRIBUTING CO
Employer

**OC: 02/24/08 R: 02
Claimant: Appellant (1)**

Section 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

Stuart Atha filed an appeal from a representative's decision dated March 24, 2008, reference 01, which denied benefits based on his separation from Ft. Dodge Distributing Company. After due notice was issued, a hearing was held by telephone on April 14, 2008. Because of time constraints, the hearing had to be recessed and reconvened on April 17, 2008. Mr. Atha participated personally. The employer participated by Dean Fogerty, President; Cliff March, Sales Manager; Darren Vaughn, Route Sales; Scott Amundson, Route Sales; Ben Cromer, On Premises Sales; Laura Franks, Office Manager; and Jeremy Fogerty, Marketing and Sales Coordinator. The employer offered additional testimony from Tammy Thompson of "Flatheads." Exhibits One through Seven were admitted on the employer's behalf.

ISSUE:

At issue in this matter is whether Mr. Atha was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Atha was employed by Ft. Dodge Distributing Company from February of 2007 until February 11, 2008. He was primarily an "on-premises" person who performed a variety of duties such as cleaning taps, displaying point-of-sale items, and making deliveries. He was discharged from the employment. The final incident that prompted the discharge was the discovery on February 1 of three empty beer cans in the car driven by Mr. Atha. No one else had driven the vehicle between the time Mr. Atha last drove it and the time the cans were discovered. The employer also discovered nine unopened cans of beer in the vehicle on January 26. The employer was also advised that Mr. Atha was observed placing cans of beer into a 12-pack carton on or about January 25. As he was doing so, he indicated he needed some "road trip beers." There was an occasion in the fall of 2007 in which Scott Amundson discovered a backpack containing ice and unopened beers in the company vehicle he received from Mr. Atha.

The employer received several complaints through its route drivers that Mr. Atha was appearing at customer locations smelling of alcohol and having the appearance of being under the influence of alcohol. There was a verbal warning to Mr. Atha on June 21, 2007 that there was to be no drinking on the job or at retail establishments during work hours.

In making the decision to discharge, the employer also considered the fact that Mr. Atha disregarded policy on January 26. Route drivers were to only leave merchandise at Brewster's if the customer had the funds to pay at the time of delivery. If Brewster's did not have the funds when the driver was there, it had to come to the warehouse to pick up merchandise. No deliveries were to be made to Brewster's outside of their normal delivery dates. Mr. Atha delivered merchandise to Brewster's on Saturday, January 26, which was not a scheduled delivery date. He also wrote out an invoice, which is contrary to the employer's policy that there were to be no handwritten invoices. Mr. Atha collected \$91.75 from Brewster's but the employer could find no record of the funds being turned over to the company.

When questioned about the \$91.75, Mr. Atha indicated he had put it in the bank bag belonging to Darren Vaughn. He acknowledged that he had not told Mr. Vaughn that he was putting money in his bag. Neither Mr. Vaughn nor the employer's bank discovered any overage of funds that would account for the \$91.75. In the fall of 2007, the employer discovered that Mr. Atha had taken a keg of beer to a bar in Webster City and told the customer to sample it to see how it was. The employer was not aware that he had given the keg to the bar. There was no paperwork completed for the keg.

Because of repeated complaints from customers, the discovery of beer cans in his vehicle, and his failure to account for funds, Mr. Atha was discharged on February 11, 2008. His discharge was delayed because Dan Fogarty was out of town from February 8 until February 11.

REASONING AND CONCLUSIONS OF LAW:

An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). For reasons that follow, the administrative law judge concludes that disqualifying misconduct has been established by the evidence. There were several customers who complained about Mr. Atha smelling of alcohol and appearing to be drunk. The administrative law judge is of the opinion that bar owners and operators would have sufficient experience to determine if an individual smelled of beer because it was spilled on him or because he had consumed it. Moreover, their complaints involved more than just the way he smelled but other factors such as red eyes and shaking.

Given the complaints from customers, it seems more likely than not that the empty beer cans discovered in Mr. Atha's company vehicle were from beers he consumed while working. Mr. Amundson testified that he discovered a backpack with ice and beers in the vehicle he received from Mr. Atha. Mr. Vaughn testified about Mr. Atha's remark that he was taking some "road trip beers." Given the totality of the evidence, the administrative law judge believes that Mr. Atha was, in fact, drinking while on duty. His conduct had the potential of adversely affecting the employer's business. If customers request that Mr. Atha not return, it creates more work for those who are able to perform the same job as Mr. Atha.

Mr. Atha's conduct in drinking on the job is sufficient, standing alone, to constitute disqualifying misconduct. He deliberately and intentionally acted in a manner he knew or should have known was contrary to the employer's expectations. For the reasons cited herein, benefits are denied.

DECISION:

The representative's decision dated March 24, 2008, reference 01, is hereby affirmed. Mr. Atha was discharged for misconduct in connection with his employment with Ft. Dodge Distributing Company. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly job insurance benefit amount, provided he satisfies all other conditions of eligibility.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/pjs