

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JOSHUA C HENDRICKSON
Claimant

BOYER RESTAURANTS INC
Employer

APPEAL 21A-UI-24059-DH-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 05/02/21
Claimant: Appellant (1)**

Iowa Code § 96.5(2)a - Discharge for Misconduct
Iowa Code § 96.5(1) - Voluntary Quit
Iowa Admin. Code r. 871-24.32(1)a - Discharge for Misconduct
Iowa Admin. Code r. 871-24.1(113)c - Discharge for Violation of Rules

STATEMENT OF THE CASE:

Claimant/appellant, Joshua Hendrickson, filed an appeal from the October 22, 2021, (reference 02) unemployment insurance decision that denied benefits, finding he was discharged 09/17/21 for violation of a known company rule. After proper notice, a telephone hearing was conducted on January 10, 2022. Claimant participated personally. Employer, Boyer Restaurants, Inc., participated through, Bob Dieter, party representative, Brian Tosky, area manager, Ethan Fischer, accounting manager, Scott Boyer, owner, Baili Roberts, manager, Tara Ash, supervisor, and Josalyn Walters, server. Judicial notice was taken of the administrative records. Employer's Exhibits #1-8 were admitted.

ISSUE:

Was the separation a layoff, discharged for misconduct or voluntarily quit without good cause?

FINDINGS OF FACT:

Having heard the testimony and reviewed the evidence and record, the undersigned finds:

Claimant was employed fulltime as a manager with a set schedule. He started on October 25, 2014 at the Fort Dodge location and his last day worked was September 17, 2021. Claimant was discharged for misconduct for an incident on September 14, 2021.

Employer has an employee handbook. Claimant received a copy when she was hired. Claimant's last acknowledgement of receiving on was 02/22/2018. Employer Exhibit 1. One policy prohibits consuming or being under the influence of intoxicants while working or on company property. Employer Exhibits 2, 3. As a manager, claimant not only knows the policies, but is required to enforce them and was so trained on October 6, 2015. Employer Exhibit 4.

On September 14, 2021, claimant was too intoxicated to report to work his 2pm to close shift. He made efforts to get coverage for his shift, getting some partial coverage. Claimant arrived to work

late. Claimant admitted to some of his coworkers that he had been drinking and/or that he was intoxicated. A number of employers could tell claimant was intoxicated from his speech being off, smelling of alcohol, unsteady balance, trouble walking, trouble carrying trays, not being able to focus and address situations that arose, getting overwhelmed, and finding empty small shot size bottles of liquor (that are served on airplanes) at the workplace. A customer commented on claimant's intoxicated behavior. Claimant kept disappearing from the worksite, heading to nearby gas stations. Because he kept leaving, work that claimant would normally do had to be done by positions that do not normally perform those functions, such as cashier, busing tables. Claimant left his shift prior to the end of his shift.

Mr. Tosky conducted an investigation from September 14-16, finding that claimant was intoxicated at work finding all of the above. Further found that claimant was coming to work intoxicated or getting intoxicated at work on other occasions, having a bottle of vodka fall out of his pocket in front of a customer on another shift. Prior times, employees had seen claimant also disappearing from work, seen at the nearby gas station and then coming back appearing to be intoxicated. Claimant was discharged on September 17, 2021 for being intoxicated at work in violation of company rules.

Claimant had previous discipline - oral warnings, where he had been cautioned about his drinking in general causing him to not be able to come into work and that claimant needs to not get drunk so he missed work and he can't be drunk at work. Due to this, claimant knew his job was in jeopardy.

Employer noted that the restaurant parking lot used to be littered with the mini airplane size bottles of vodka and since claimant being terminated, this problem has largely stopped.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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 Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). The Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The focus of the administrative code definition of misconduct is on deliberate, intentional or culpable acts by the employee. *Id.*

The employer is entitled to establish reasonable work rules and expect employees to abide by them. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. An employer has a "right to expect decency and civility from its employees." *Myers v. Emp't Appeal Bd.*, 462 N.W.2d 734, 738 (Iowa Ct. App. 1990).

The decision in this case rests, at least in part, on the credibility of the witnesses. It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

After assessing the credibility of the witnesses who testified during the hearing, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using his

own common sense and experience, the administrative law judge finds the employer's version of events to be more credible than the claimant's recollection of those events. Claimant's blanket denial of any and all wrongdoing in the face of all of the evidence to the contrary is not credible. In the present case, claimant was intoxicated. His intoxication led to his being late to work, not able to perform his duties and showing symptoms sufficient for numerous individuals being able to surmise him being intoxicated. Claimant admitted to others at work that he was intoxicated. He disappeared from work a number of times during his shift, sometimes going to a nearby gas station.

The employer has presented substantial and credible evidence that claimant violated workplace rules regarding not being intoxicated at work. This is disqualifying misconduct. Benefits are denied.

DECISION:

The October 22, 2021, (reference 02) unemployment insurance decision that denied benefits is **AFFIRMED**. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.



Darrin T. Hamilton
Administrative Law Judge

April 4, 2022
Decision Dated and Mailed

dh/mh