

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DANIEL J HENRIKUS
Claimant

HOA RESTAURANT HOLDER LLC
Employer

APPEAL 19A-UI-02173-LJ-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 02/17/19
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the March 5, 2019, (reference 01) unemployment insurance decision that allowed benefits based upon a determination that claimant was discharged and the employer failed to establish willful or deliberate misconduct. The parties were properly notified of the hearing. A telephonic hearing was held on March 28, 2019. The claimant, Daniel J. Henrikus, participated. The employer, HOA Restaurant Holder, L.L.C., participated through Jimmy Freeman, Employee Relations Specialist; and Brian McCabe, Regional Manager. Employer's Exhibit 1 was received and admitted into the record without objection. The administrative law judge took official notice of the administrative record.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time, most recently as a general manager, from October 2, 2017, until February 18, 2019, when he was discharged. On January 25, 2019, one of the restaurant's customers bought claimant a shot and claimant drank it while on the clock. McCabe learned about this incident on or about January 28, 2019. He immediately contacted Freeman, who advised him to conduct an investigation. McCabe took statements from employees and managers who were present at the time of the incident, and he reviewed the video footage from the incident. The employer maintains a Management Consumption of Alcoholic Beverage Policy. (Exhibit 1, page 3) This policy prohibits managers from consuming alcoholic beverages within their home stores. Claimant denies he received a copy of this policy. Ultimately, the employer discharged claimant on February 18 after concluding he violated the policy.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$1,587.00, since filing a claim with an effective date of February 17, 2019, and a reopened date of March 3, 2019, for the three weeks ending March 23, 2019. The administrative record also establishes that the employer did not participate in the fact-finding interview or make a first-hand witness available for rebuttal.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was not discharged for a current act of misconduct. Benefits are allowed, provided he is otherwise eligible.

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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r.871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

A lapse of 11 days from the final act until discharge when claimant was notified on the fourth day that his conduct was grounds for dismissal did not make the final act a "past act." Where an employer gives seven days' notice to the employee that it will consider discharging him, the date of that notice is used to measure whether the act complained of is current. *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988). An unpublished decision held informally that two calendar weeks or up to ten work days from the final incident to the discharge may be considered a current act. *Milligan v. Emp't Appeal Bd.*, No. 10-2098 (Iowa Ct. App. filed June 15, 2011). In reviewing past acts as influencing a current act of misconduct, the ALJ should look at the course of conduct in general, not whether each such past act would constitute disqualifying job misconduct in and of itself. *Attwood v. Iowa Dep't of Job Serv.*, No. __-__, (Iowa Ct. App. filed __, 1986).

In this case, claimant was discharged twenty-one days after the employer learned that he consumed alcohol on the premises. The employer never notified claimant that he was being investigated or told him that his job could be in jeopardy. Even if claimant violated the employer's policy, the employer waited too long to discharge him for this incident. The employer has not established a current or final act of misconduct. Accordingly, benefits are allowed. As claimant's separation from employment is not disqualifying, the issues of overpayment, repayment, and chargeability are moot.

DECISION:

The March 5, 2019, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. The issues of overpayment, repayment, and chargeability are moot. The issues of overpayment, repayment, and chargeability are moot.

Elizabeth A. Johnson
Administrative Law Judge

Decision Dated and Mailed

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