

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ROSE M MEDINA

Claimant

APPEAL NO. 14A-UI-01940-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BELLE/SIOUX CITY RIVERBOAT

Employer

OC: 01/19/14

Claimant: Respondent (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

Iowa Code Section 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the February 12, 2014, reference 01, decision that allowed benefits to the claimant provided the claimant was otherwise eligible and that held the employer's account could be charged for benefits. After due notice was issued, a hearing was held on March 12, 2014. Claimant Rose Medina did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Queeta Hewitt represented the employer and presented additional testimony through Damien Smith. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits Two through 13 into evidence. The administrative law judge took official notice of the documents submitted for and generated in connection with fact-finding interview, but did so only for the purpose of determining whether the employer participated in the fact-finding interview.

ISSUES:

Whether Ms. Medina was discharged for misconduct in connection with the employment that disqualifies her for unemployment insurance benefits.

Whether Ms. Medina was overpaid unemployment insurance benefits.

Whether Ms. Medina must repay benefits.

Whether the employer's account may be charged for benefits already paid or for future benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Rose Medina was employed by Belle/Sioux City Riverboat / Argo Casino as a full-time food and beverage server from 2010 until January 21, 2014, when the employer discharged her from the employment for serving alcohol to two patrons who were under the legal age to consume alcohol. The employer's written policy required that Ms. Medina request proof of age from any patron who attempted to purchase alcoholic beverages and who looked under 30 years old.

Ms. Medina was aware of the policy. The incident that triggered the discharge occurred on January 20, 2014. After a security officer denied entry of the two underaged patrons to the casino, the security officer observed Ms. Medina serving alcohol to the two underaged patrons in the restaurant adjacent to the casino. The security officer summoned a supervisor, who enlisted the assistance of the food and beverage supervisor. The security staff confiscated the alcohol that Ms. Medina had served to the patrons. The two patrons had represented to Ms. Medina that they had just come from the casino and had left their IDs in their vehicle. Ms. Medina thought the two patrons looked under 21 years of age, the legal age for consuming alcohol, but elected to serve each a single beer. Ms. Medina knew at the time she served the alcohol to the patrons without requiring proof of age that she was violating the employer's policy concerning sale of alcohol. At the time the employer questioned Ms. Medina about the matter, Ms. Medina was able to clearly state the employer's established policy. Ms. Medina stated that she knew what she did was "wrong" and "stupid." Ms. Medina added, "This is what I get for being nice."

Ms. Medina's decision to serve alcohol to underaged patrons subjected her to possible criminal charges and fines and exposed the employer to civil penalties that could have impacted the employer's liquor license.

Ms. Medina established a claim for benefits that was effective January 19, 2014 and received \$349.00 in benefits for the week that ended January 25, 2014.

The employer did not participate in the February 10, 2014 fact-finding interview that led to the February 12, 2014 decision that allowed benefits. At the time the notice of the fact-finding interview was mailed to the employer, the employer was in the process of switching from one third-party representative to another. The employer was switching from Talx/Equifax to Employers Edge. The employer's representative of record, Talx/Equifax, had due notice of the fact-finding interview. It was Talx/Equifax that had submitted the employer's protest. Talx/Equifax had not indicated in the protest materials who, if anyone, would be representing the employer at the fact-finding interview. At the time of the 1:20 p.m. fact-finding interview, the Claims Deputy nonetheless attempted unsuccessfully to contact the employer and left a message. An employer representative who lacked personal knowledge returned the Claims Deputy's call and indicated that Queeta Hewitt was the person who needed to be contacted for the fact-finding. At 3:34 p.m., the Claims Deputy attempted to contact Ms. Hewitt, but had to leave a message. Ms. Hewitt called back later the same day to indicate that she was in training, but was prepared to provide a statement. On the next day, the Claims Deputy once again attempted to reach Ms. Hewitt to obtain a statement, but had to leave a message. Ms. Hewitt subsequently called and left a message for the Claims Deputy, but did not receive a further call back from the Claims Deputy.

REASONING AND CONCLUSIONS OF LAW:

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.

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The evidence in the record establishes intentional violation of the employer's written policy concerning the sale of alcohol. The weight of the evidence indicates that Ms. Medina was not merely negligent, but that she knowingly and intentionally provided alcohol to two people she believed to be under the legal age to purchase alcohol. Ms. Medina's conduct was in willful and wanton disregard of the employer's interest in complying with applicable laws pertaining to the sale of alcohol so as to avoid civil penalties and to preserve the employer's license to sell such products.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Medina was discharged for misconduct. Accordingly, Ms. Medina is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3-7-a, -b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid \$349.00 in benefits for the week that ended January 25, 2014. The employer did not participate in the fact-finding interview within the meaning of the law. The employer had received appropriate notice of the fact-finding interview through the notice that was mailed to the employer's representative of record. At the time set for the fact-finding interview, the employer had no one with personal knowledge available to participate in the fact-finding interview. The employer's desire, later, to provide input did not amount to participating in the fact-finding interview within the meaning of the law. The claimant is not required to repay the benefits she has received. The employer's account may be charged for the benefits already paid to the claimant. The employer's account will not be charged for any benefits paid to the claimant for the period on or after March 19, 2014.

DECISION:

The Claims Deputy's February 12, 2014, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The claimant is overpaid \$349.00 in benefits for the week ending January 25, 2014. The claimant is not required to repay those benefits and the employer's account may be charged for those benefits. The employer's account will not be charged for any benefits paid to the claimant for the period on or after March 19, 2014.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs