

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SCOTT V SUTERA
Claimant

APPEAL NO. 09A-UI-09515-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HARVEY'S BR MANAGEMENT CO INC
Employer

**Original Claim: 05/17/09
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Harvey's BR Management Company, Inc. (employer) appealed a representative's June 29, 2009 decision (reference 01) that concluded Scott V. Sutera (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on July 20, 2009. The claimant participated in the hearing, was represented by George Sutera, attorney at law, and presented testimony from one other witness, Michael Monahan. Tonya Achenbach appeared on the employer's behalf and presented testimony from two other witnesses, Jeremy Wiedel and Thleen Blood. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on February 22, 2006. He worked full-time as a bartender at the employer's casino. His last day of work was May 6, 2009. The employer discharged him on May 8, 2009. The reason asserted for the discharge was misappropriation of company assets by failing to obtain payment from customers for beverages in a series of transactions.

Through video surveillance, the employer concluded that for the period between April 24 and May 2 there had been 13 transactions where the claimant did not obtain any or full payment for the beverages provided to the customers, with a value between \$75.00 and \$87.00. The employer's official policy was that complimentary beverages could only be given with the prior approval of the supervisor, Mr. Wiedel. However, there was an informal practice that a bartender could give complimentary beverages on occasion and obtain subsequent approval.

The claimant was denied the opportunity to observe the video surveillance the employer used to determine he had inappropriately failed to obtain proper payment for beverages. He speculated

that some of the instances could have been where he believed the customer was part of a larger group that was covering the drinks, and that some of the instances could have been where he had intended to provide a complimentary drink and report it to Mr. Wiedel after the fact, and then forgot to do so. He denied he intentionally failed to obtain payment to harm the employer's interests, but rather was attempting to advance the employer's interests in providing good consumer relations. He had not been provided with any advance warning that his practice was not permitted and that continuation could result in discharge.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits, an employer must establish the employee was responsible for a deliberate act or omission that was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior that 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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. 871 IAC 24.32(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is his failure to obtain proper payment for beverages in a series of transactions. Misconduct connotes volition. Huntoon, supra. There is no evidence the claimant intentionally failed to obtain full and proper payment knowing that he was harming the employer's interests or knowing that he was placing his job in jeopardy. Under the circumstances of this case, the claimant's actions were the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence, and were the result of a good-faith error in judgment or discretion. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's June 29, 2009 decision (reference 01) is affirmed. The employer did discharge the claimant, but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/kjw