

IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI

ROBANN D DUMOND  
1166 IDEAL AVE  
PISGAH IA 51564

ANNIE FREIHAGE  
DBA LOESS HILLS COUNTRY CORNER  
103 FIRST STREET  
PISGAH IA 51564

JOE BASQUE  
IOWA LEGAL AID  
532 FIRST AVENUE #300  
COUNCIL BLUFFS IA 51503-0899

Appeal Number: 04A-UI-00076-RT  
OC: 11-30-03 R: 01  
Claimant: Appellant (1)

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4<sup>th</sup> Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant, Robann D. Dumond, filed a timely appeal from an unemployment insurance decision dated December 24, 2003, reference 01, denying unemployment insurance benefits to her. After due notice was issued, a telephone hearing was held on January 26, 2004 with the claimant participating. The claimant was represented by Joseph Basque, Attorney at Law. Chris Christensen and Monty Armstrong were to be witnesses for the employer but the administrative law judge was unable to reach either of those two witnesses when called. Annie Freihage, Co-Owner, and David Freihage, Co-Owner, participated in the hearing for the employer, Annie Freihage, doing business as Loess Hills Country Corner. Although the claimant had requested an in-person hearing in her appeal, she waived that in-person hearing request and consented to have the hearing held by telephone.

#### FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a part-time bartender from April 2002 until she was discharged on November 26, 2003. The claimant's hours varied. The claimant was discharged for consuming alcoholic beverages while on duty in violation of the employer's policy. The employer does have a policy that prohibits employees from drinking while on duty but allows one drink for each employee on the house at the end of the shift. On Sunday, November 23, 2003, the claimant drank a beer while on duty. The claimant had implied approval from David Freihage, Co-Owner and one of the employer's witnesses, to consume the beer. The claimant was aware of the employer's policy at the time that she consumed the beer and at all other material times hereto. The policy was posted on the side of the employer's refrigerator. On several occasions, Annie Freihage, Co-Owner and one of the employer's witnesses, had warned the claimant verbally that she was not to be drinking while on duty and that the employer could lose its liquor license as a result. Nevertheless, when Annie Freihage was not around, the claimant consumed alcoholic beverages while on duty for the employer in violation of the employer's policy sometimes with the implied permission of David Freihage. On some occasions when a customer did ask Mr. Freihage if he could buy the claimant a drink, he would state only after the end of her shift.

#### REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from employment was a disqualifying event. It was.

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).

In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. The administrative law judge concludes, although it is a close question, that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer's witness, David Freihage, Co-Owner, testified that he personally observed the claimant on a number of occasions drink an alcoholic beverage while on duty in violation of the employer's policy. The last occasion was on Sunday, November 23, 2003, which triggered the claimant's discharge on November 26, 2003. Mr. Freihage denied ever giving the claimant permission to do so. The claimant conceded that she did drink alcoholic beverages but had the express permission of Mr. Freihage. Neither Mr. Freihage nor the claimant are particularly credible. Mr. Freihage equivocated occasionally when specifically asked if he gave the claimant permission. Mr. Freihage did appear in some ways credible when he conceded that, when he was acting as bartender, he did on occasion have a drink in violation of the employer's policy. He did not have to make such a statement. The claimant testified adamantly that she had permission from Mr. Freihage but conceded that Mr. Freihage was the one who discharged her. The administrative law judge concludes on the evidence here that the claimant had implied permission or at least was justified in believing that she had implied permission from Mr. Freihage to drink alcoholic beverages while on duty. However, what convinces the administrative law judge that the claimant committed disqualifying misconduct is the uncontroverted evidence that the employer had a policy prohibiting employees from drinking while on duty and providing for one drink on the house at the end of the employee's shift. Even the claimant concedes that the employer had this policy and that she was aware of it. The claimant also concedes that she had several warnings from Annie Freihage, Co-Owner and one of the employer's witnesses, about drinking while on duty and was informed that her doing so could result in the loss of the employer's liquor license. Despite these warnings from Ms. Freihage and her knowledge of the employer's policies, she continued to drink while on the job. The administrative law judge concludes that the claimant did so with full knowledge that it was not permitted and, therefore, it was a deliberate act or omission constituting a material breach of her duties and obligations arising out of her worker's contract of employment and evinces a willful or wanton disregard of the employer's interests and is, at the very least, carelessness or negligence in such a degree of recurrence as to be disqualifying misconduct. The administrative law judge does not believe it is a defense to drinking in violation of the employer's policy and, in face of the warnings from Annie Freihage, one of the owner's, that she had some kind of implied or tacit approval from another co-owner, David Freihage. This is a close question because of the credibility of the parties but the administrative law judge concludes that the claimant was aware of the employer's policy, was clearly admonished about the policy at least by Ms. Freihage on a number of occasions, and was further informed that the employer could lose its liquor license but nevertheless insisted on drinking while on duty in violation of the employer's policy. Accordingly, and for all the reasons set out above, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct, and, as a consequence, she is disqualified to receive unemployment

insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless she requalifies for such benefits.

DECISION:

The representative's decision of December 24, 2003, reference 01, is affirmed. The claimant, Robann D. Dumond, is not entitled to receive unemployment insurance benefits until or unless she requalifies for such benefits.

tjc/b