

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

RYLEY A MATHERLY
Claimant

APPEAL NO. 18A-UI-11361-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BLAZIN WINGS INC C/O ADP UCM
Employer

OC: 10/07/18
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 November 13, 2018, reference 01, decision that held the claimant was eligible for benefits provided he was otherwise eligible and that the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on October 8, 2018 for no disqualifying reason. After due notice was issued, a hearing was held on December 6, 2018. Claimant Ryley Matherly participated. Emily Woolsey represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview and, if not, whether the claimant engaged in fraud or intentional misrepresentation in connection with the fact-finding interview.

ISSUES:

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

Whether the claimant was overpaid unemployment insurance benefits.

Whether the claimant must repay overpaid benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Ryley Matherly was employed by Blazin Wings, Inc., d/b/a/ Buffalo Wild Wings, as a full-time bartender from 2014 until October 8, 2018, when Emily Woolsey, General Manager, discharged him from the employment for repeated instances of "free-pouring" alcoholic. The employer's written policies include a policy that requires bartenders to use a jigger, an alcohol measuring device, 100 percent of the time. The policy allows the employer to track inventory and control costs. The policy also ensures that patrons do not receive too little or too much alcohol in their

drinks. The employer provided Mr. Matherly with appropriate training in his bartending duties and in the jigger use requirement at the start of the employment. At all relevant times, Mr. Matherly understood the policy and understood that he was required to follow the policy. In April 2018, Mr. Matherly violated the employer's policy by free-pouring while performing his bartending duties. The General Manager at the time, Scott Duncan, observed the behavior and issued a "final written warning" to Mr. Matherly for the policy violation. Mr. Matherly signed the warning. On October 6, 2018, Ms. Woolsey observed Mr. Matherly free-pouring alcohol while performing his bartending duties on a busy Saturday night. The drink Mr. Matherly was pouring called for 1.25 ounces of alcohol, but Ms. Woolsey observed Mr. Matherly pour a quantity of alcohol that appeared to exceed 1.25 ounces. Ms. Woolsey pointed out the violation at the time of the incident and Mr. Matherly acknowledged at that time that he was knowingly violating the policy. At the time of the incident, there were sufficient jiggers available for Mr. Matherly's use. The discharge followed two days later.

Mr. Matherly established an original claim for unemployment insurance benefits that Iowa Workforce Development deemed effective October 7, 2018. Mr. Matherly received \$2,590.00 in benefits for 10 weeks between October 7, 2018 and December 15, 2018. Blazin Wings, Inc. is the sole base period employer.

On November 7, 2018, an Iowa Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed Mr. Matherly's separation from the employment. Neither the employer nor its third-party representative made itself available for the fact-finding interview. The employer submitted no documentation for the fact-finding interview. The employer's initial protest of the claim provided no meaningful information regarding the basis for the discharge. Mr. Matherly participated in the fact-finding interview and provided a verbal statement to the deputy that did not include intentionally misleading or fraudulent statements.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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).

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).

Continued failure to follow reasonable instructions constitutes misconduct. See *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See *Woods v. Iowa Department of Job Service*, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See *Endicott v. Iowa Department of Job Service*, 367 N.W.2d 300 (Iowa Ct. App. 1985).

The evidence in the record establishes that Mr. Matherly was discharged on October 8, 2018 for misconduct in connection with the employment. The employer's policy requiring use of a jigger at all times was a reasonable policy. The employer provided Mr. Matherly with appropriate training in the policy. Mr. Matherly fully understood that he was required to follow the policy. The weight of the evidence indicates that there were adequate jiggers available at all relevant times so that Mr. Matherly could comply with the policy. Mr. Matherly elected to violate the policy in April 2018 by free-pouring and received a "final written warning." The final written warning reinforced the directive to use jiggers at all times and placed Mr. Matherly on notice that his employment would be in jeopardy if he elected to violate the policy in the future.

Mr. Matherly again elected to violate the policy on October 6, 2018 by free-pouring alcohol. In both instances, Mr. Matherly did not have a reasonable basis for violating the policy. It was just as important to measure pours at times when the restaurant was busy as when the restaurant was less busy. Mr. Matherly's repeated, unreasonable violation of the reasonable directive constituted insubordination and misconduct in connection with the employment. Accordingly, Mr. Matherly is disqualified for benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. Mr. Matherly must meet all other eligibility requirements.

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) and (b).

Mr. Matherly received \$2,590.00 in benefits for 10 weeks between October 7, 2018 and December 15, 2018, but this decision disqualifies him for those benefits. Accordingly, the benefits constitute an overpayment of benefits. Because Mr. Matherly did not receive the benefits as a result of fraud or willful misrepresentation, and because the employer failed to participate in the fact finding interview, Mr. Matherly is not required to repay the overpaid benefits. The employer's account may be assessed for the overpaid benefits, but will not be charged for benefits for the period beginning December 16, 2018.

DECISION:

The November 13, 2018, reference 01, decision is reversed. The claimant was discharged on October 8, 2018 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. The claimant is overpaid \$2,590.00 in benefits for 10 weeks between October 7, 2018 and December 15, 2018. The claimant is not required to repay the overpaid benefits. The employer's account may be assessed for the overpaid benefits, but will not be charged for benefits for the period beginning December 16, 2018.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs