

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

THOMAS GUNN
511 CHESTNUT ST
MONTROSE IA 52639-9789

IOWA BEER & BEVERAGE CO
FLECK SALES CO
1825 EDGEWOOD RD SW
CEDAR RAPIDS IA 52404-2320

AMENDED
Appeal Number: 06A-UI-02276-RT
OC: 01/29/06 R: 04
Claimant: Respondent (2)

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, 4th 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.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Iowa Beer & Beverage Company, Fleck Sales Company, filed a timely appeal from an unemployment insurance decision dated February 17, 2006, reference 01, allowing unemployment insurance benefits to the claimant, Thomas Gunn. After due notice was issued, a telephone hearing was held on March 14, 2006, with the claimant participating. Becky Brennan, Manager of Beck Oil, testified for the claimant. Tim Manderscheid, Branch Sales Manager, and Brian McLain, Sales Supervisor, participated in the hearing for the employer. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

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 full-time driver merchandiser from July 17, 2004, until he was discharged on February 2, 2006. The claimant was discharged for insubordination and refusing to perform work as instructed by the employer. On January 31, 2006, the Branch Sales Manager, Tim Manderscheid, the employer's witness, wanted to talk to the claimant about some performance issues when the claimant refused to perform functions that he was instructed to do and to give the claimant a written warning. Mr. Manderscheid met with the claimant and Brian McLain, Sales Supervisor and one of the employer's witnesses, and Pete Korb, Account Manager. At this meeting on January 31, 2006, the claimant "went off." He began yelling at the others and using profanity including saying to them "fuck you", "go to hell", and saying that he was not going to listen to "fucking" anybody and I'm going on my "fucking" route. Mr. Manderscheid tried to calm the claimant down without success. Mr. Manderscheid asked the claimant to talk in a civil manner. The claimant informed Mr. Manderscheid that he could go ahead and fire him and send him home that the claimant did not care. This went on for between five and ten minutes when Mr. Manderscheid sent the claimant home that day. The next working day for the claimant, February 1, 2006, the claimant did not come to work claiming that his child was sick. When the claimant came to work on February 2, 2006 he was discharged. The employer has a policy or rule in its handbook, a copy of which the claimant received, and of which he was aware, that requires that employees treat fellow employees and customers respectfully. The claimant had never received any warnings for this kind of behavior.

The meeting arose on January 31, 2006 and the written warning was given to the claimant for an alleged refusal to build a beer display at Beck Oil, a convenience store on the claimant's delivery route. On January 23, 2006, the claimant delivered 100 cases of beer. He did begin building the display but it was too big and the Beck Oil Manager, Becky Brennan, the claimant's witness, asked the claimant to build a smaller display. The claimant did so with the help of a Beck Oil employee, Amy. Amy informed the employer that she had had to build the display, and the employer was concerned and wanted to talk to the claimant about this. On January 27, 2006, an account manager, Pete Korb asked the claimant to hang a banner at Beck Oil and the claimant refused stating that it was not his job but it was part of the claimant's job. On January 28, 2006, another Account Manager, Ralph Smith, also asked the claimant to hang a banner and the claimant again refused stating that it was not his job. Mr. Manderscheid wanted to discuss these matters with the claimant on January 31, 2006 and these matters gave rise to the written warning that he received on January 31, 2006.

Pursuant to his claim for unemployment insurance benefits filed effective January 29, 2006, the claimant has received unemployment insurance benefits in the amount of \$2,181.00 as follows: \$237.00 for benefit week ending February 4, 2006 and \$324.00 for six weeks from benefit week ending February 11, 2006 to benefit week ending March 18, 2006. However, of the amount, \$324.00 was offset against an overpayment for vacation pay. The claimant actually received benefits totaling \$1,857.00

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from unemployment was a disqualifying event. It was.

2. Whether the claimant is overpaid unemployment insurance benefits. He is.

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).

The parties agree, and the administrative law judge concludes, that the claimant was discharged on February 2, 2006. 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 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 two employer's witnesses, Tim Manderscheid, Branch Sales Manager, and Brian McLain, Sales Supervisor, credibly testified that at a meeting with the claimant on January 31, 2006 to admonish the claimant for certain work functions that the claimant refused to perform and to give the claimant a written warning, the claimant "went off" yelling and using profanity repeatedly. The claimant's use of profanity and other statements are set out in the findings of fact. The claimant denied using any profanity and testified that he refused to talk to the

individuals without someone from the Cedar Rapids office. However, the claimant's testimony is outweighed by the testimony of the employer's two witnesses who were both present at the meeting and testified credibly that the claimant did use the language as assigned to him and as set out in the findings of fact. Mr. Manderscheid attempted to calm the claimant down by asking him to talk civilly but it was without success. The claimant was then sent home and then discharged two days later. The claimant was not discharged the next day after the meeting because he was absent. The employer has a rule or policy in its handbook, a copy of which the claimant received and of which he was aware, that requires that employees be respectful to fellow employees and customers. The administrative law judge is constrained to conclude that the claimant's behavior and language demonstrated at the meeting on January 31, 2006, were deliberate acts constituting a material breach of his duties and obligations arising out of his worker's contract of employment and evince willful or wanton disregard of the employer's interests and are disqualifying misconduct. In Myers v. Employment Appeal Board, 462 N.W.2d 734, 738 (Iowa App. 1990), the Iowa Court of Appeals held that the use of profanity or offensive language in a confrontational, disrespectful or name-calling context, may be recognized as misconduct, even in the case of isolated incidents or situations in which the target of abusive name-calling is not present. The target of the abusive name-calling was present here and even though this may have been an isolated incident, the prolonged nature of the incident coupled with the unsuccessful efforts of Mr. Manderscheid to calm the claimant down, and the extreme nature of the claimant's vulgarity, establishes disqualifying misconduct. Accordingly, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until, or unless, he requalifies for such benefits. It is true that to some extent the written warning given to the claimant on January 31, 2006 was not deserved in as much as the claimant had built a beer display at Beck Oil on January 23, 2006 but the claimant did concede that he had refused to hang the banners. In any event, even if the claimant's written warning was not justified, this does not excuse the claimant's extreme behavior at the meeting.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$1,857.00 since separating from the employer herein on or about February 2, 2006 and filing for such benefits effective January 29, 2006. The administrative law judge further concludes that the claimant is not entitled to these benefits and is overpaid such benefits. The administrative law judge finally concludes these benefits must be recovered in accordance with provisions of Iowa law.

DECISION:

The representative's decision of February 17, 2006, reference 01, is reversed. The claimant, Thomas Gunn, is not entitled to receive unemployment insurance benefits, until, or unless, he requalifies for such benefits, because he was discharged for disqualifying misconduct. He has been overpaid unemployment insurance benefits in the amount of \$1,857.00. However, \$237.00 of this has been set up on a prior overpayment leaving a balance of \$1,620.00.

cs/tjc/tjc