

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRUCE HEAD
Claimant

APPEAL NO: 10A-UI-01580-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

G M R I INC
Employer

OC: 12-27-09
Claimant: Respondent (2R)

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the January 20, 2010, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on March 11, 2010. The claimant participated in the hearing with former server Eric Doxsee. Marco Holter, General Manager and Theresa Evens, Service Manager, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as full-time server for Red Lobster from April 27, 2008 to December 23, 2009. The claimant and former server Eric Doxsee were working a split shift December 23, 2009. They finished their lunch shift at 1:30 p.m. and were to return at 4:45 p.m. for the dinner shift. When they returned General Manager Marco Holter went to the claimant to ask him about his absence the day before and smelled alcohol on the claimant's breath. Mr. Holter asked the claimant where he and Mr. Doxsee were between shifts and the claimant said a Mexican restaurant. He asked the claimant if he had been drinking and the claimant said he had "one, maybe two" margaritas and Mr. Holter reminded the claimant the employer had a zero tolerance for reporting for work under the influence and terminated his employment. The claimant asked for another chance and when Mr. Holter again said it was a zero tolerance issue the claimant said, "I hope this covers you. I'll see you in court. Fuck you," and slapped Mr. Holter on the back. There had been previous reports about the claimant being under the influence of alcohol on two or three prior occasions but the employer could not prove it.

The claimant has claimed and received unemployment insurance benefits since his separation from this employer.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job misconduct.

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 proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Mr. Holter and Service Manager Theresa Evens both smelled alcohol on the claimant's breath and he admitted to drinking "one, maybe two" margaritas at a Mexican restaurant between shifts. If Mr. Holter and Ms. Evens could smell the alcohol on the claimant's breath it is a good bet customers could do so as well. While the claimant was not on the clock at the time he consumed alcohol he knew he was returning to work at 4:45 p.m. and there is no difference between drinking between shifts and drinking before a shift. The claimant violated the employer's no tolerance policy by being under the influence at work and although he may not have been legally intoxicated he still violated the spirit as well as the letter of the employer's policy. Consequently, under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Benefits are denied.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code section 96.3-7. In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

DECISION:

The January 20, 2010, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs