

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BROOKE ESSY
Claimant

APPEAL NO. 15A-UI-09421-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OLD MARKET VENTURES LLC
Employer

OC: 07/05/15
Claimant: Appellant (1)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Brooke Essy filed a timely appeal from the August 10, 2015, reference 03, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on an Agency conclusion that Ms. Essy had been discharged on July 10, 2015 for misconduct in connection with the employment. After due notice was issued, a hearing was held on September 9, 2015. Ms. Essy participated. The employer provided written notice that it was waiving its participation in the hearing. The hearing in this matter was consolidated with the hearing in Appeal Number 15A-UI-09422-JTT. The administrative law judge took official notice of the Agency's administrative record of benefits paid to Ms. Essy.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Brooke Essy was employed by Old Market Ventures, L.L.C., doing business as Twin Peaks, as a food and beverage server from October 2014 until July 10, 2015, when the employer discharged her from the employment for consuming alcohol at the workplace while under the legal age. Ms. Essy was 19 years old at the time. On July 10, 2015, Ms. Essy had completed her shift, had changed into her street clothes and was waiting in the workplace for coworkers to get off work. Ms. Essy elected to take a drink of a coworker's or friend's alcoholic drink. A manager observed the conduct and notified Ms. Essy that he had to discharge her from the employment. At the time of the discharge, the manager invited Ms. Essy to contact the employer at a later date about returning to the employment. Ms. Essy recently began a new period of employment with the same employer.

REASONING AND CONCLUSIONS OF LAW:

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.

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).

Iowa Code section 123.47 provides, in relevant part as follows:

Persons under eighteen years of age, persons eighteen, nineteen, or twenty years of age, and persons twenty-one years of age and older

1. A person shall not sell, give, or otherwise supply alcoholic liquor, wine, or beer to any person knowing or having reasonable cause to believe that person to be under legal age.

2. a. Except for the purposes described in subsection 3, a person who is the owner or lessee of, or who otherwise has control over, property that is not a licensed premises, shall not knowingly permit any person, knowing or having reasonable cause to believe the person to be under the age of eighteen, to consume or possess on such property any alcoholic liquor, wine, or beer.

b. A person who violates this subsection commits the following:

(1) For a first offense, a simple misdemeanor punishable as a scheduled violation under section 805.8C, subsection 8.

(2) For a second or subsequent offense, a simple misdemeanor punishable by a fine of five hundred dollars.

c. This subsection shall not apply to any of the following:

(1) A landlord or manager of the property.

(2) A person under legal age who consumes or possesses any alcoholic liquor, wine, or beer in connection with a religious observance, ceremony, or rite.

3. A person or persons under legal age shall not purchase or attempt to purchase, consume, or individually or jointly have alcoholic liquor, wine, or beer in their possession or control; except in the case of liquor, wine, or beer given or dispensed to a person under legal age within a private home and with the knowledge, presence, and consent of the parent or guardian, for beverage or medicinal purposes or as administered to the person by either a physician or dentist for medicinal purposes and except to the extent that a person under legal age may handle alcoholic beverages, wine, and beer during the regular course of the person's employment by a liquor control licensee, or wine or beer permitted under this chapter.

4. a. A person who is eighteen, nineteen, or twenty years of age, other than a licensee or permitted, who violates this section regarding the purchase of, attempt to purchase, or consumption of alcoholic liquor, wine, or beer, or possessing or having control of alcoholic liquor, wine, or beer, commits the following:

(1) A simple misdemeanor punishable as a scheduled violation under 805.8C, subsection 7.

Despite the employer's waiver of presence at the hearing, Ms. Essy's testimony was sufficient to establish misconduct in connection with the employment. Ms. Essy's testimony establishes that she knowingly broke the underage drinking law referenced above. The violation of the law occurred at the employer's place of business and immediately following Ms. Essy's shift. Ms. Essy's conduct not only implicated her in the violation of the law, but also put the employer's business at risk, since the violation involved alcohol sold by the employer and the violation occurred on the employer's property.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Essy discharged for misconduct. Effective July 10, 2015, Ms. Essy is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged for benefits based on wages paid to the claimant for work performed on or before July 10, 2015.

DECISION:

The August 10, 2015, reference 03, decision is affirmed. The claimant was discharged on July 10, 2015 for misconduct in connection with the employment. Effective July 10, 2015, the claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The employer's account shall not be charged for benefits based on wages paid to the claimant for work performed on or before July 10, 2015.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css