

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

---

**CALVIN LINDSEY**

Claimant

**APPEAL 17A-UI-00474-JCT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**KINSETH HOTEL CORPORATION**

Employer

**OC: 12/11/16**

**Claimant: Respondent (1)**

---

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

Iowa Code § 96.3(7) – Recovery of Benefit Overpayment

Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

**STATEMENT OF THE CASE:**

The employer filed an appeal from the January 6, 2017, (reference 02) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on February 2, 2017. The claimant participated personally. Patrice Green, fiancé of the claimant, also testified. The employer participated through hearing representative, Carolyn Karettis, with Employer's Unity. Ryan Dix, restaurant manager, and Christopher Andrews, p.m. manager, testified for the employer. Employer's Exhibits 1 through 7 were admitted. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUES:**

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can any charges to the employer's account be waived?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed part-time as a dishwasher and was separated from employment on December 3, 2016, when he was discharged for reportedly filling a water bottle with wine in the workplace (Employer Exhibit 1).

The employer has a policy which prohibits employees from being under the influence or consuming alcohol at the workplace. The claimant was made aware of the employer policies and procedures at hire (Employer Exhibits 6 and 7) and was discharged based on a single incident. On November 26, 2016, the claimant worked the evening shift. Christopher Andrews, p.m. manager, and Ryan Dix, general manager, were both working that evening as well. The undisputed evidence is that it was a busy evening for the restaurant. According to Mr. Andrews, between 8:30 and 9:00 p.m., the claimant was observed taking a clear water bottle and walking

over to where white wine is stored and dispensed through a box. The box is stored on a lower shelf and Mr. Andrews saw the claimant kneel over at it (Employer Exhibit 4). There is no business purpose or need for the claimant to retrieve wine for his job as a dishwasher. Mr. Andrews stated he did not see the claimant drink from the bottle or appear otherwise impaired. Mr. Andrews did not say anything to the claimant at that time because they were "extremely busy". Another co-worker, Patrick, also reportedly saw the claimant pour wine at work on November 26, 2016, but did not report it immediately (Employer Exhibit 5). He did not attend the hearing and it was uncertain why he would not have reportedly immediately the claimant taking wine either. The rush slowed down around 10:00 p.m., and Mr. Andrews did not report the incident to Mr. Dix or confront the claimant, stating they were busy cleaning. It was not until November 27 or 28, that Mr. Andrews asked the morning manager, Tammy, if she had heard what happened because "rumors" were going around. She then reported the incident to Mr. Dix, who did not interview the claimant prior to discharge. According to Mr. Dix, the claimant denied taking the wine but said he had come to work drunk. He was subsequently discharged.

The claimant denied referencing being drunk to Mr. Dix at separation or taking the wine. He acknowledged he had used his clear water bottle to fill with lemonade, which is permissible by the employer. He was not screened for alcohol or drug use at any time related to the incident.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$945.00, since filing a claim with an effective date of December 11, 2016. The administrative record also establishes that the employer did participate in the January 5, 2017 fact-finding interview by way of Gloria Her, unemployment claims representative with Employer's Unity.

#### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

Iowa Code § 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).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

In an at-will employment environment, an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.* Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

The claimant was discharged for a single incident of reportedly pouring employer wine into his personal water bottle at work on November 26, 2016. Regardless if the claimant consumed the alcohol, the taking of wine could also reasonably be construed as theft, in addition to any alcohol use policy. In reviewing the testimony offered and the written statement of Patrick, the claimant's co-worker, the administrative law judge finds the claimant's testimony to be more

credible than the employer. Inasmuch as Mr. Andrews reportedly saw the claimant take the wine and pour it in his water bottle, around 8:30 or 9:00 on November 26, 2016, it is unsettling why he would not have reported the incident either immediately to Mr. Dix, who was also working that evening, or even after the rush slowed down. Nor did Mr. Andrews confront the claimant at any point during the shift, even though he was in a management role. Rather, Mr. Andrews did not raise the issue with Mr. Dix, but rather talked to a different manager on November 27 or 28 and asked if she heard what had happened, and it was she that reported the incident to Mr. Dix.

Cognizant of the busyness and chaos that can ensue in a busy restaurant kitchen, the administrative law judge is not persuaded that the employer, on one hand argued that the conduct was so egregious that it warranted discharge instead of a lesser penalty, but then allowed the claimant to continue working, in light of alleged theft of wine and possible alcohol use on the job. Had Mr. Andrews or the other employee reported the incident that day, the claimant could have been questioned and even screened for alcohol consumption. Instead, the claimant denied the taking of wine, or consumption of it, and credibly testified he had filled his clear water bottle with lemonade, which was permissible. Based on the evidence presented, the administrative law judge concludes the employer may have been justified in discharging the claimant, but work-connected misconduct as defined by the unemployment insurance law has not been established in this case.

Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant's conduct leading separation was misconduct under Iowa law.

Because the claimant is eligible for benefits, the issues of overpayment and relief of charges are moot.

**DECISION:**

The January 6, 2017, (reference 02) decision is affirmed. The claimant was not discharged from employment due to job-related misconduct. Benefits are allowed, provided he is otherwise eligible. The claimant has not been overpaid unemployment insurance benefits in the amount of \$945.00, and the employer's account is not relieved of charges.

---

Jennifer L. Beckman  
Administrative Law Judge

---

Decision Dated and Mailed

jlb/rvs