

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MEGAN R MCMEINS**  
Claimant

**APPEAL NO. 07A-UI-00679-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**GMRI INC**  
Employer

**OC: 12/17/06 R: 03**  
**Claimant: Respondent (2)**

Section 96.5(2)(a) – Discharge for Misconduct  
Section 96.3(7) – Recovery of Overpayment

**STATEMENT OF THE CASE:**

GMRI (Olive Garden) filed a timely appeal from the January 10, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on February 5, 2007. Claimant Megan McMeins did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. General Manager Carrie Bisby represented the employer. The administrative law judge took official notice of the Agency's records regarding benefits disbursed to the claimant and received employer's Exhibits One through Five into evidence.

**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: Megan McMeins was employed by the Coralville Olive Garden as a full-time server from December 2005 until December 18, 2006, when General Manager Carrie Bisby discharged her for possessing and consuming alcohol under the legal age at the workplace. The incident that prompted the discharge occurred on December 16, when Ms. Bisby discovered multiple "kids' cups" at a server workstation. Ms. Bisby was aware that employees were not allowed to utilize the kids' cups for personal use. Ms. Bisby saw that each cup was labeled with a nickname. Ms. Bisby examined the contents of the cups and discovered that they contained wine. Ms. Bisby approached an employee who was working at the time and the employee named Ms. McMeins as one of four employees involved in the matter. Ms. Bisby interviewed Ms. McMeins and Ms. McMeins admitted to drinking the wine with her coworkers. Ms. McMeins also provided a written statement. Ms. McMeins was 19 years old at the time of the incident and, therefore, under the legal drinking age. The employer's written policy prohibited employees from consuming alcohol on the job or serving alcohol to a person under the legal age. Ms. McMeins was aware of both policies at the time of the incident.

Ms. McMeins established a claim for benefits that was effective December 17, 2006 and has received benefits totaling \$597.00.

**REASONING AND CONCLUSIONS OF LAW:**

The question is whether the evidence in the record establishes that Ms. McMeins was discharged for misconduct in connection with the employment. It does.

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 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).

The weight of the evidence in the record establishes that Ms. McMeins knowingly and willfully possessed and consumed alcohol under the legal age in violation of Iowa Code section 123.47 and the employer’s written policy. The conduct was in willful disregard of the employer’s interests, including the employer’s interest in complying with applicable liquor laws in order to maintain its liquor license. The conduct was in willful violation of the standards of conduct the employer reasonably expected of its employees.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. McMeins was discharged for misconduct. Accordingly, Ms. McMeins 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 paid to Ms. McMeins.

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.

Because Ms. McMeins has received benefits for which she has been deemed ineligible, those benefits constitute an overpayment that Mr. McMeins must repay to Iowa Workforce Development. Ms. McMeins is overpaid \$597.00.

**DECISION:**

The Agency representative’s January 10, 2007, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and paid wages for insured work equal to ten times her weekly

benefit allowance, provided she meets all other eligibility requirements. The claimant is overpaid \$597.00.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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