

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MANUEL D PINA
Claimant

APPEAL NO. 11A-UI-12956-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

COUNCIL BLUFFS PAYROLL CO
Employer

OC: 08/28/11
Claimant: Respondent (2-R)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, Council Bluffs Payroll, filed an appeal from a decision dated September 20, 2011, reference 01. The decision allowed benefits to the claimant, Manuel Pina. After due notice was issued, a hearing was held by telephone conference call on October 25, 2011. The claimant did not provide a telephone number where he could be contacted and did not participate. The employer participated by Human Resources Generalist Ann Holch.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Manuel Pina was employed by Council Bluffs Payroll from May 18, 2009 until August 26, 2011 as a full-time cook. On April 17, 2011, a supervisor believed he was under the influence of alcohol and he was tested. The test results were .148 and .145.

The employer presented him with a last-chance agreement which he signed on April 28, 2011. It required him to contact the employee assistance program (EAP) within 24 hours and to complete an assessment. He was further to comply with all the recommendations of the assessment. Mr. Pina did contact the EAP and the assessment recommended a 12-step program with group and individual sessions. A failure to abide by the terms of the agreement would be grounds for immediate discharge. He was allowed to continue working during treatment.

Human Resources Generalist Ann Holoch and Supervisor Clint Eckhardt met with Mr. Pina on June 7, 2011, to discuss with him reports from the EAP he was delinquent on attending his sessions. After that he missed appointments on June 14 and 21, 2011. In July the employer adjusted his work schedule so it would be easier for him to attend the sessions.

Ms. Holoch was informed later he missed appointments August 8, 9, 11, 15, and 16, 2011. She and Mr. Eckhardt again met with the claimant on August 26, 2011, to ask him what the problem

was. He admitted to skipping the appointments and acknowledged he was not in compliance with the last-chance agreement. He stated he simply did not want to go to the sessions. At that point the employer determined it had done as much as possible to assist Mr. Pina without success and he was discharged.

Manuel Pina has received unemployment benefits since filing a claim with an effective date of August 28, 2011.

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.

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 claimant voluntarily entered into the last chance agreement in order to maintain his job. He knew his job was in jeopardy if he failed to comply with the terms of the agreement. In fact he did fail to comply with the program recommended by the EAP because he simply did not want to do so.

The employer had done as much as possible to assist Mr. Pina in meeting the terms of the agreement but he did not choose to meet his obligations. The employer has the obligation to provide a safe and harassment-free work environment for all employees and the claimant being drunk on the job interfered with its ability to do so. When given the opportunity to preserve his job he refused to do so. This is a violation of the duties and responsibilities the employer has

the right to expect of an employee and conduct not in the best interests of the employer. The claimant is disqualified.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

The claimant has received unemployment benefits to which he is not entitled. The question of whether the claimant must repay these benefits is remanded to the UIS division.

DECISION:

The representative's decision of September 20, 2011, reference 01, is reversed. Manuel Pina is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount in insured work, provided he is otherwise eligible. The issue of whether the claimant must repay the unemployment benefits is remanded to UIS division for determination.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/css