

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

DAVID J MAY
66 CAROL LN
HIAWATHA IA 52233-1221

CEDAR RAPIDS COMMUNITY SCHOOL
DISTRICT
ATTN PAYROLL DEPT
346 – 2ND AVE SW
CEDAR RAPIDS IA 52404-2045

Appeal Number: 06A-UI-04023-RT
OC: 10/30/05 R: 03
Claimant: Appellant (5)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-1 – Voluntary Quitting
Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The claimant, David J. May, filed a timely appeal from an unemployment insurance decision dated March 30, 2006, reference 03, denying unemployment insurance benefits to him because he voluntarily quit work on November 1, 2005 for personal reasons and his quitting was not caused by his employer. After due notice was issued, a telephone hearing was held on April 28, 2006, with the claimant participating. Jean Milne was available to testify for the claimant but not called because her testimony would have been repetitive and unnecessary since the employer's witness testified. Matt Dunbar, Associate Director of Human Resources, participated in the hearing for the employer, Cedar Rapids Community School District. The

administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant. Although not set out on the notice of appeal, the parties permitted the administrative law judge to take evidence on, and decide, if necessary, whether the claimant is overpaid unemployment insurance benefits under Iowa Code section 96.3(7).

The administrative law judge called the employer's witness at 9:00 a.m. and reached a voicemail for him. The administrative law judge left a message that he was going to proceed with the hearing and that if the witness wanted to participate he would need to call before the hearing was over and the record was closed. The administrative law judge then reached the claimant and began the hearing. Because the claimant wanted the employer's witness to participate, the administrative law judge called the employer's witness again at 9:13 a.m. and reached him and he participated in the balance of the hearing.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full-time building engineer from February 25, 1980, until he separated from his employment on November 1, 2005. The claimant was given the option of resigning or be discharged and the claimant chose to resign. If the claimant had not resigned he would have been discharged. The claimant was given this choice because on a Tuesday in early or mid-October of 2005, the claimant showed up for work at Hiawatha Elementary School intoxicated. The night before, a Monday, the claimant began drinking and continued drinking until the early morning hours of Tuesday. The claimant stopped drinking between 2:00 a.m. and 2:30 a.m. The claimant then was scheduled to work at 6:00 a.m. and went to work. The claimant's actions, speech, behavior, and odor of breath, indicated that he was intoxicated. Workers at Hiawatha Elementary School confronted the claimant and asked if he wanted to be tested for alcohol. The claimant refused. The employer has a drug and alcohol testing policy but it does not apply to the claimant. The claimant refused because he believed that the alcohol test would show that he was over the legal limit and was intoxicated. The claimant was then placed on an administrative leave. The employer's witness, Matt Dunbar, Associate Director of Human Resources, investigated the matter. His investigation revealed that the claimant demonstrated characteristics of intoxication while at work on that Tuesday. Mr. Dunbar confronted the claimant and asked him why he had not taken the alcohol test and the claimant stated that he would have probably been over the legal limit. The employer has a policy that prohibits an employee coming to work intoxicated and this policy applies to the claimant and the claimant was aware of the policy. Approximately one year earlier, the claimant had been given an oral warning about coming to work intoxicated. At all relevant and material times hereto, the claimant was assigned to an elementary school and was around students and was aware that his conduct needed to be in all ways appropriate when around such elementary students. The claimant was not drinking on the employer's premises or in the presence of the students. The employer does not contest unemployment insurance benefits being paid to the claimant.

Pursuant to his claim for unemployment insurance benefits filed effective October 30, 2005, the claimant has received unemployment insurance benefits in the amount of \$1,011.00 as follows: \$337.00 per week for three weeks from the benefit week ending December 3, 2005 to the benefit week ending December 17, 2005. From the benefit week ending November 5, 2005 to the benefit week ending November 26, 2005 the claimant was disqualified to receive unemployment insurance benefits because of severance pay and vacation pay. The claimant then reopened his claim for unemployment insurance benefits effective March 12, 2006 but has

received no benefits since reopening his claim because records show he is disqualified as a result of a voluntary quit.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was.
2. Whether the claimant is overpaid unemployment insurance benefits. He is.

Iowa Code section 96.5-1 provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

871 IAC 24.26(21) provides:

Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

- (21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

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 parties agree, and the administrative law judge concludes, that the claimant was forced to resign on November 1, 2005 or be discharged. The parties agree that the claimant resigned but that if he had not resigned he would have been discharged. When a claimant is compelled to resign or given the choice of resigning or being discharged, his leaving is not considered voluntary but rather as a discharge. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct.

The administrative law judge concludes that there is a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The facts are really not in dispute between the parties. On a Tuesday in early or mid-October of 2005, the claimant came to work at 6:00 a.m. after having been drinking the night before until the early morning hours, 2:00 a.m. or 2:30 a.m. on the Tuesday that the claimant came to work. The claimant was scheduled to work and went to work on that Tuesday at 6:00 a.m. The claimant had been drinking for quite some time and up to just 3½ to 4 hours before he went to work. The evidence establishes that the claimant's actions, speech, behavior, and odor of breath indicated that the claimant was intoxicated. The claimant merely testified that he did not feel that his actions, speech, behavior and breath so indicated but did not deny that he had been drinking recently before work or that he was intoxicated. The evidence establishes that the claimant refused an alcohol test simply because he believed the test would show that he was over the legal limit and therefore intoxicated. The administrative law judge must conclude here that the claimant came to work intoxicated. The evidence also establishes that the claimant worked for an elementary school and was around elementary school students. The claimant was aware that being around elementary students required that his conduct be in all ways appropriate. Even the claimant conceded that his drinking showed "poor judgment." The administrative law judge strongly agrees. The claimant should have been fully aware that drinking up until 3½ to 4 hours before going to work would render him intoxicated at work. The claimant was aware of a policy applicable to him prohibiting coming to work intoxicated. The claimant had even been warned one year earlier about such behavior. The administrative law judge has no choice but to conclude here that the claimant's behavior in coming to work intoxicated was a deliberate act constituting a material breach of his duties and obligations arising out of his worker's contract of employment and evinces a willful or wanton disregard of the employer's interests and, at the very least, is carelessness or negligence in such a degree of recurrence, all as to establish disqualifying misconduct.

The employer does not contest unemployment insurance benefits for the claimant. The employer's response to the notice of claim, commonly referred to as a "protest" indicates in the remarks section "no protest" but nevertheless the employer filed the protest when it could have just done nothing. It may well be that the claimant "self-protested" when he filed his claim for unemployment insurance benefits. In any event, the issue now is not whether the employer contested benefits but whether the claimant is disqualified to receive unemployment insurance benefits. Here, for whatever reason, the claimant's claim for benefits was protested, either by the employer or by the claimant as a self-protest. A fact-finding hearing was held and, to the claimant's credit, he was truthful and forthright to the fact finder. The fact finder then issued a

decision denying benefits. The claimant then appealed that decision. The issue now posed to the administrative law judge is not whether the employer contests benefits but whether the facts indicate that the claimant is or is not disqualified to receive unemployment insurance benefits. The administrative law judge is constrained to conclude here that the claimant is disqualified to receive unemployment insurance benefits for the reasons set out above. Unemployment insurance benefits are denied to the claimant until, or unless, he requalifies for such benefits.

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.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$1,011.00 since separating from the employer herein on or about November 1, 2005 and filing for such benefits effective October 30, 2005. The administrative law judge further concludes that the claimant is not entitled to these benefits and is overpaid such benefits. The administrative law judge finally concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of March 30, 2006, reference 03, is modified. The claimant, David J. May, is not entitled to receive unemployment insurance benefits, until, or unless, he requalifies for such benefits, because he was discharged for disqualifying misconduct. He has been overpaid unemployment insurance benefits in the amount of \$1,011.00.

cs/tjc