

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KENNETH WEST
Claimant

APPEAL NO. 07A-UI-00167-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MIKES HILLTOP TAP INC
Employer

**OC: 12/03/06 R: 04
Claimant: Respondent (2)**

Section 96.5(2)a – Discharge
Section 95.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer, Mike's Hilltop Tap, filed an appeal from a decision dated December 26, 2006, reference 01. The decision allowed benefits to the claimant, Kenneth West. After due notice was issued, a hearing was held by telephone conference call on January 23, 2007. The claimant participated on her own behalf. The employer participated by Owner Mike Blaesing, Manager Shelly Brus and was represented by Attorney Steve Kundel. Exhibit One was admitted into the record.

ISSUE:

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

FINDINGS OF FACT:

Kenneth West was employed by Mike's Hilltop Tap from October 2004 until November 6, 2006, as a full-time bartender. The claimant received a written warning March 29, 2005, for being drunk and disorderly while on duty, and "yelling" at and barring one long-time customer.

On October 28, 2006, Owner Mike Blaesing was at the bar and received a number of complaints from regular customers about the claimant's behavior the night before. He was apparently drunk, acting "strangely," leaving the beer tap on to overflow the pitcher and wasting much of the beer down the drain, he was not waiting on customers in a timely manner, "overpoured" some liquor so that customers had to ask for more mixer to be added to their drinks, and other matters. Mr. Blaesing told Manager Shelly Brus to issue the claimant a written warning which she did on October 31, 2006.

In the meantime, as other staff and customers began to become aware of the problem, many came forward with information that the claimant had taken beer, cigarettes and liquor from the bar without paying for them. He confirmed with the manager that payments had not been made for some of these items. The decision was made to discharge him and the manager notified Mr. West on November 6, 2006.

Kenneth West has received unemployment benefits since filing a claim with an effective date of December 3, 2006.

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.

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 claimant had previously been warned about being drunk and disorderly while on duty. While the employer acknowledges bartenders are allowed to drink an occasional beer while on duty, it is understood they are not to overindulge to the point it interferes with their work. The claimant violated this rule again on October 27, 2006,

DECISION:

The representative's decision of December 26, 2006, reference 01, is reversed. Kenneth West is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount, provided he is otherwise eligible. He is overpaid in the amount of \$465.00.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/css