

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

HAROLD D WILMING
Claimant

BETHANY ENTERPRISES INC
Employer

APPEAL 21A-UI-01410-DZ-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 07/26/20
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quit
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer Participation in Fact-Finding

STATEMENT OF THE CASE:

Bethany Enterprises Inc, the employer/appellant, filed an appeal from the December 15, 2020, (reference 05) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on February 19, 2021. The employer participated through Stacey Weeks, area supervisor, Delrae Bashaw, store manager and Bob Marlow, store assistant manager. Mr. Wilming did not participate. Official notice was taken of the administrative record.

ISSUE:

Was Mr. Wilming discharged for misconduct?
Was Ms. Wilming overpaid benefits?
Should Mr. Wilming repay benefits and/or should the employer be charged based on its participation in the fact-finding interview?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Wilming began working for the employer on December 1, 2019. He worked as a full-time cashier. His last day of work was June 28, 2020.

The employer's policy provides that drinking on the job is prohibited and violation of this policy results in immediate termination. Mr. Wilming acknowledged receiving the policy on December 1, 2019. The employer does not have a drug or alcohol testing policy.

On June 7, 2020 several customers and other employees reported to Ms. Bashaw, the store manager and Mr. Wilming's supervisor that Mr. Wilming smelled of alcohol at work. They also reported that he was stumbling and slurring his words. Ms. Bashaw was not the store where Mr. Wilming was working that day. On June 10, 2020, Ms. Bashaw asked Mr. Wilming about the June 7 incident. Mr. Wilming asked Ms. Bashaw what she was talking about. Ms. Bashaw

described what had been reported to her. Mr. Wilming responded by again asking Ms. Bashaw what she was talking about. Ms. Bashaw gave Mr. Wilming a verbal warning that drinking on the job is a violation of the employer's policy and will result in termination of his employment. Ms. Bashaw told Ms. Weeks about the incident.

On June 28, 2020, Mr. Wilming showed up for work. He had a cup in his possession with liquid in the cup. Mr. Marlow, the store assistant manager, personally observed Mr. Wilming slurring his words and stumbling. Mr. Marlow asked Mr. Wilming if he was drinking alcohol. Mr. Wilming denied doing so and began screaming at Mr. Marlow in the presence of customers. Mr. Wilming went to bathroom and left his cup filled with liquid outside the bathroom. Mr. Marlow smelled the liquid in the cup and it smelled of alcohol. Mr. Marlow called Ms. Bashaw who called Ms. Weeks. Ms. Weeks and Ms. Bashaw agreed that Mr. Wilming's employment should be terminated for violating the employer's policy against drinking on the job. Ms. Bashaw informed Mr. Marlow and Mr. Marlow told Mr. Wilming that his employment was terminated for violating the employer's policy against drinking on the job.

Mr. Wilming received \$1,680.00 in regular unemployment insurance (UI) benefits for ten weeks from July 26, 2020 through October 3, 2020.

The employer had the opportunity to and did participate in the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes Mr. Wilming was discharged from employment due to job-related misconduct.

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 establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 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. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

The employer is entitled to establish reasonable work rules and expect employees to abide by them. The employer has presented credible evidence that Mr. Wilming knew about the employer's policy prohibiting drinking on the job and that he had been warned on June 10, 2020 that violation of the policy would result in his immediate termination. Despite the warning, Mr. Wilming engaged in similar behavior just over two weeks later. This is disqualifying misconduct. Benefits are denied.

The administrative law judge further concludes that Mr. Wilming has been overpaid regular UI benefits in the amount of \$1,680.00, he must repay those benefits and the employer's account will not be charged.

Iowa Code §96.3(7) provides, in pertinent part:

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) (a) 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.

(b) 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.

Iowa Admin. Code r. 871-24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if un rebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be

either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)“b” as amended by 2008 Iowa Acts, Senate File 2160.

Mr. Wilming has been overpaid regular UI benefits in the amount of \$1,680.00 as he was not qualified and/or was ineligible to receive regular UI benefits.

DECISION:

The December 15, 2020, (reference 05) unemployment insurance decision is reversed. Mr. Wilming was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. Mr. Wilming was overpaid regular UI benefits in the amount of \$1,680.00, which must be repaid.



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March 1, 2021
Decision Dated and Mailed

dz/lj