

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARTIN MUTAI
Claimant

APPEAL NO. 13A-UI-08793-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**PRAIRIE MEADOWS RACETRACK &
CASINO**
Employer

OC: 07/07/13
Claimant: Respondent (2/R)

Iowa Code § 96.5(2)(a) - Discharge for Misconduct
Iowa Code § 96.3-7 - Overpayment

STATEMENT OF THE CASE:

Prairie Meadows Racetrack & Casino (employer) appealed an unemployment insurance decision dated July 29, 2013, reference 01, which held that Martin Mutai (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 3, 2013. The claimant participated in the hearing. The employer participated through Tracey Casey, Human Resources Generalist.

ISSUE:

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

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was employed as a full-time hard count team member from May 9, 2011 through July 10, 2013 when he was discharged for refusing a breathalyzer. He arrived at work around 1:00 a.m. on July 7, 2013 smelling strongly of alcohol. The claimant's motor skills were impaired and his speech was slurred so security was called to the main entrance to escort him to take a breathalyzer. The claimant refused to submit to the breathalyzer. His lieutenant attempted to give him the breathalyzer five different times and the claimant resisted by refusing to take the test and/or by putting his tongue on the breathalyzer. A person has to blow in the breathalyzer for a certain length of time for the test to be valid. Finally, the lieutenant called another lieutenant and two armed officers and they tried again to give him the breathalyzer.

The incident was recorded on surveillance tape and the claimant can be seen arguing with the officers. The claimant was given a 15-minute break and the employer tried again. The employer eventually took the voided test, which was the air in the tube from the claimant, and it

read .157 when a positive test for alcohol is .04. The claimant called someone to get him and left the work site. The employer subsequently discharged him for refusing the breathalyzer.

The claimant admitted consuming alcohol approximately six hours before reporting to work on July 7, 2013. He also admitted in the hearing that he smelled of alcohol that night. However, he denies violating company policy.

The claimant filed a claim for unemployment insurance benefits effective July 7, 2013 and has received benefits after the separation from employment.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-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. 871 IAC 24.32(1).

The employer has the burden to prove the discharged employee is disqualified for benefits for misconduct. *Sallis v. Employment Appeal Bd.*, 437 N.W.2d 895, 896 (Iowa 1989). The claimant was discharged on July 7, 2013 for reporting to work under the influence of alcohol and for refusing the breathalyzer test. The evidence does confirm the claimant had consumed alcohol before reporting to work. Rehabilitation was not offered due to the claimant's refusal to take the test. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3-7-a, -b.

The matter of deciding the amount of the overpayment and whether the amount overpaid should be recovered from the claimant and charged to the employer under Iowa Code § 96.3-7-b is remanded to the Agency.

DECISION:

The unemployment insurance decision dated July 29, 2013, reference 01, is reversed. The claimant is not eligible to receive unemployment insurance benefits because he was discharged from work for misconduct. Benefits are withheld until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The matter is remanded for investigation and determination of the overpayment issue.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/css