

**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**

**FREDERIC M MCLAUGHLIN
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DES MOINES IA 50393**

**MERCY HOSPITAL
ATTN HUMAN RESOURCES
1055 – 6TH AVE STE 105
DES MOINES IA 50314**

**Appeal Number: 05A-UI-02753-RT
OC: 02-13-05 R: 02
Claimant: Appellant (1)**

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 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant, Frederic M. McLaughlin, filed a timely appeal from an unemployment insurance decision dated March 9, 2005, reference 01, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held on April 4, 2005 with the claimant participating. The employer, Mercy Hospital, did not participate in the hearing because the employer did not call in a telephone number, either before the hearing or during the hearing, where any witnesses could be reached for the hearing, as instructed in the notice of appeal.

FINDINGS OF FACT:

Having heard the testimony of the witness 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 maintenance person from October 2001 until he was discharged on February 3, 2005. The claimant was discharged for an incident on February 1, 2005. While the claimant was off work and in the evening, the claimant drank three or four beers with his friends. Approximately mid-night, the claimant stopped by his office to obtain some personal items. He was not on the clock but he was on the employer's premises and in his office. While retrieving these items, the claimant accidentally locked his keys and jacket and other matters in the office. Therefore, the claimant waited for security. When security arrived, they smelled beer on the claimant's breath and took him for a breath test, which he failed, showing positive for alcohol. The claimant worked on February 2, 2005 and explained to his supervisor what happened. The claimant was then discharged on February 3, 2005. The employer has an alcohol and drug policy, including testing for alcohol and prohibiting coming to work with alcohol on the breath and having drunk alcohol. The claimant was not offered any rehabilitation. The claimant had been subject to a prior complaint but did not have alcohol on his breath at that time.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from employment was a disqualifying event. It was.

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 testified, and the administrative law judge concludes, that he was discharged on February 3, 2005. 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 claimant testified that after drinking three or four beers, he returned to the employer's premises and his office, approximately mid-night, to retrieve some personal items. While there, the claimant accidentally locked his keys and jacket in the office and had to wait for security to arrive to open the door so he could retrieve his keys and jacket. When security arrived, they smelled beer on his breath. The claimant conceded that he had been drinking that night. The employer has a drug and alcohol policy. The administrative law judge concludes that the claimant's behavior in drinking at least three or four beers and then returning to work and being on the employer's premises after drinking is a deliberate act or omission 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 is disqualifying misconduct.

The administrative law judge also notes that the claimant took a breathalyzer test, which showed positive for alcohol. The administrative law judge concludes that this also was disqualifying misconduct. The claimant's Breathalyzer test must comply with Iowa Code section 730.5. However, 730.5(7)(f) provides that notwithstanding any provision of this section to the contrary, alcohol testing, including confirmatory testing, may be conducted pursuant to requirements established by the employer's written policy. The administrative law judge concludes that the claimant's Breathalyzer test was pursuant to the employer's policy and, therefore, the positive test was disqualifying misconduct. It is true that the employer has over 50 employees and the claimant was employed by the employer 12 of the last 18 months and was not offered rehabilitation pursuant to Iowa Code section 730.5(9)(g) which requires that the employer's written policy provide for rehabilitation. The administrative law judge concludes that the policy does provide for rehabilitation but was not offered to the claimant. The real question here is whether rehabilitation must be offered to the claimant. The administrative law judge concludes that it does not. Iowa Code section 730.5(9)(g) refers to Iowa Code section 730.5(10)(a)(1) which provides that disciplinary action "may" include a requirement that the employee enroll in a employer provided approved rehabilitation treatment or counseling program or at (3) termination of employment. The administrative law judge does not believe that the employer must, under these circumstances, provide for rehabilitation. Accordingly, the administrative law judge concludes that the claimant's positive Breathalyzer test was also disqualifying misconduct. Even assuming that the employer was required to offer rehabilitation to the claimant under the positive Breathalyzer test, the administrative law judge concludes that the claimant would still be disqualified to receive unemployment insurance benefits because of his conduct in coming to the office on the employer's premises after having drunk at least three or four beers and with alcohol on his breath and being on the employer's premises.

In summary, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct, and, as a consequence, he is disqualified to receive unemployment

insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he requalifies for such benefits.

DECISION:

The representative's decision of March 9, 2005, reference 01, is affirmed. The claimant, Frederic M. McLaughlin, is not entitled to receive unemployment insurance benefits, until or unless he requalifies for such benefits, because he was discharged for disqualifying misconduct.

tjc/kjf