

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KENNETH SANDERS
Claimant

APPEAL NO: 12A-UI-13571-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BLAZIN WINGS INC
Employer

OC: 09/30/12
Claimant: Respondent (2/R)

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

STATEMENT OF THE CASE:

Blazin Wings, Inc. (employer) appealed an unemployment insurance decision dated November 1, 2012, reference 01, which held that Kenneth Sanders (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 December 12, 2012. The claimant participated in the hearing. The employer participated through Michelle Hawkins, Employer Representative. Employer's Exhibits One and Two and Claimant's Exhibits A, B and C were admitted into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

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 hospitality server from approximately August 2011 through February 18, 2012 when he was discharged. Employees are required to report their absences at least two hours prior to the beginning of their shifts. Two no-call/no-show absences within a one year period will be considered job abandonment and employment will be terminated. Absences for reasons other than illness, injury or other emergency are considered unexcused and unexcused absences will be treated the same as a no-call/no-show.

The claimant's manager sent him home on February 12, 2012 after he reported to work "visibly intoxicated." A written warning was prepared but the claimant said it was never issued to him. In fact, he testified that the manager thought "the fact that he was hung over from the night before" was "funny."

The claimant did not work on February 13, 14 and 15. He went to jail on February 16, 2012 and did not get released until February 21, 2012. The claimant testified that he was in a motor vehicle accident on February 16, 2012 and that he went to jail for "public intox."

He was scheduled on February 17, 2012 at 5:15 p.m. The employer received a call at 4:30 p.m. from Police Officer Lindecker who reported that the claimant was in jail and would not be able to work. The employer prepared a final written warning on that date due to the unexcused absence and the warning states that if he had another unexcused absence, he would be terminated. The claimant did not receive the warning because he did not return to work. He testified that he would not have been able to work that evening because his face was swollen and had stitches.

The claimant was also scheduled at 11:00 a.m. on February 18, 2012 but called in to report his absence at 9:10 a.m. that morning. He testified that he told the jailer that he needed to call the employer at 9:00 a.m. The claimant also testified that he could not work due to having stitches and staples in his face.

The claimant filed a claim for unemployment insurance benefits effective September 30, 2012 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.

Iowa Code § 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

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errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

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 February 18, 2012 for violation of company policy after he missed work on two consecutive days due to incarceration. He failed to properly report those absences and had been sent home earlier that week after he reported to work visibly intoxicated. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer. 871 IAC 24.32(7). The employer has met its burden. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

Iowa Code § 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code § 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The unemployment insurance decision dated November 1, 2012, 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 to the Claims Section for investigation and determination of the overpayment issue.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/css

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