

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

MULUGETA ZERIHOON
2044 – 15TH ST A
MOLINE IL 61265

JOHN Q HAMMONS
DAVENPORT
C/O TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 06A-UI-00511-HT
OC: 12/11/05 R: 04
Claimant: Respondent (2)

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
Section 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer, John Q. Hammons Davenport (Hammons), filed an appeal from a decision dated January 6, 2006, reference 01. The decision allowed benefits to the claimant, Mulugeta Zerihoun. After due notice was issued a hearing was held by telephone conference call on January 31, 2006. The claimant participated on his own behalf. The employer participated by Director of Food and Beverage Dave Yordy, Human Resources Director Jill Julius, Restaurant Manager John Smith.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: Mulugeta Zerihoun was employed by Hammons from February 6, 2001 until December 9, 2005. He was a full-time dining room server.

The claimant had received written warnings regarding his attendance on July 27, 2004, July 7, 2005 and August 13, 2005. The final warning was given to him by Director of Food and Beverage Dave Yordy and Human Resources Manager Jill Julius. During the discussion which accompanied the written warning, Mr. Yordy and Ms. Julius stressed that this was a final warning and any further incidents of absenteeism would result in discharge.

On December 7, 2005, the claimant was off duty but came into the restaurant, and he was intoxicated. This is against the company policies and he was sent home in the company van around 9:30 p.m.. His scheduled shift the next day was from 6:00 a.m. until 2:30 p.m. but he called in at 4:00 a.m. and left a message saying he would not be in. The attendance policy requires three hours' notice of any unscheduled absence.

Mr. Zerihoun came into work on December 9, 2005, and was discharged by Restaurant Manager John Smith. Although the claimant maintained at the appeal hearing he had been absent the day before because he had fallen on the evening of December 7, 2005, and bruised his face severely, Mr. Smith did not see any bruises on his face at the time of the discharge.

Mulugeta Zerihoun has received unemployment benefits since filing a claim with an effective date of December 11, 2005.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant is disqualified. The judge concludes he is.

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, (7) provide:

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).

(7) Excessive unexcused absenteeism. 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.

The claimant had been advised his job was in jeopardy as a result of his attendance. The employer stressed this at the time the last written warning was given in August 2005. In spite of the warning the claimant called in absent for work on December 8, 2005, and did not call in at least three hours before the start of the shift as required.

Mr. Zerihoun maintains he did not come in to work because he fell down and bruised his face but the fact that no bruise was observed by his manager the next day impairs the credibility of this statement. It appears the claimant was intoxicated late in the evening before his shift and it is highly suspicious he would be absent the next day. The administrative law judge considers it to be a very strong probability Mr. Zerihoun did not come in to work because of his alcohol consumption the night before. This cannot be considered an illness, and even if it were, it was not properly reported at least three hours before the start of the shift.

The record establishes the claimant was discharged for policy violations of being intoxicated in the restaurant while off duty, excessive absenteeism, and improperly reporting his final absence. This is conduct not in the best interests of the employer and the claimant is disqualified.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

The claimant has received unemployment benefits to which he is not entitled. These must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of January 6, 2006, reference 01, is reversed. Mulugeta Zerihoun 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 \$1,632.00.

bgh/kjf