

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

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KUM & GO LC
D/B/A KUM & GO
C/O TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 04A-UI-00437-RT
OC: 12-07-03 R: 02
Claimant: Respondent (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
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Kum & Go LC, doing business as Kum & Go, filed a timely appeal from an unemployment insurance decision dated January 7, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Jesse J. Birmingham. After due notice was issued for a telephone hearing on February 5, 2004, at 9:00 a.m., the claimant did not call in a telephone number as instructed in the notice of appeal. As discussed below, the employer initially withdrew the appeal but later apparently decided to have a hearing. In any event, the administrative law judge, three times, the last of which was at 9:05 a.m., tried to call the employer's witness, Chas Heath, at the telephone number where he purportedly could be reached and the telephone number provided by the employer's representative, TALX UC eXpress. On each occasion the administrative law judge reached the voice mail of a "Chas."

The administrative law judge finally left a message at 9:05 a.m. that he was going to wait until 9:15 a.m. and if Chas Heath, or anyone else for the employer, wanted to participate they needed to call by 9:15 a.m. As of 9:30 a.m., no one had called from the employer. Consequently, no hearing was held. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

At 3:13 p.m. on Wednesday, February 4, 2004, the administrative law judge received a fax from the employer's representative, TALX UC eXpress, withdrawing the employer's appeal. At approximately 8:30 a.m. on Thursday, February 5, 2004, the representative called the Appeals Section and spoke to a staff person and left a telephone number for the employer's witness, Chas Heath. The representative did not inform the staff person of the withdrawal or that the withdrawal was being rescinded. The administrative law judge confirmed that quite clearly with the staff member in question. Because of the prior withdrawal the administrative law judge attempted to call the employer's witness, Chas Heath, at 8:42 a.m. and again at 8:55 a.m. On both occasions the administrative law judge was unable to reach Mr. Heath but rather, got a voice mail for a "Chas." The administrative law judge left messages that he was calling to inquire into the apparent mix-up between the employer and its representative. The administrative law judge then called Stephanie Cawvey, the client's service representative for the employer's representative, TALX UC eXpress. Eventually, the administrative law judge was able to talk to Ms. Cawvey, who informed the administrative law judge that the withdrawal had been rescinded. Apparently the employer's corporate headquarters had been unable to reach Mr. Heath and had therefore informed the representative to withdraw the appeal, but Mr. Heath called apparently late on February 4, 2004 and indicated that he wanted a hearing and, therefore, a number was provided in the morning of February 5, 2004. However, Mr. Heath was not at the telephone number provided to the Appeals Section. If it were not for the gravity of this matter, this would be a comedy of errors. It is most irregular to have a withdrawal faxed one day and a rescission made that same day without informing the Appeals Section until the next morning approximately 30 minutes prior to the hearing. It is even more unusual that once the rescission had been made that the Appeals Section was unable to reach the employer's witness. No hearing was held in this matter and the administrative law judge will determine the matter based upon the administrative file.

FINDINGS OF FACT:

Having examined the record, the administrative law judge finds: An authorized representative of Iowa Workforce Development issued a decision in this matter on January 7, 2004, reference 01, determining that the claimant was eligible to receive unemployment insurance benefits because records indicate he was dismissed from work on November 28, 2003 for alleged misconduct, but the employer did not furnish sufficient evidence to show misconduct.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.
2. Whether the claimant is overpaid unemployment insurance benefits. He is not.

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).

In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code Section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. Specifically, the employer did not participate in the hearing and provide sufficient evidence of deliberate acts or omissions on the part of the claimant constituting a material breach of his duties and/or evincing a willful or wanton disregard of an employer's interest and/or in careless or negligence in such a degree of recurrence as to establish disqualifying misconduct. The employer's protest is silent on any reasons for the separation or dates, and is merely signed as certified correct. A letter accompanied the protest, indicating that the claimant was discharged for violation of company policy and that he sold alcohol after state set time. The employer did not participate in fact finding. The claimant stated that a customer came in to purchase alcohol, namely, beer, but did not have sufficient funds so the claimant paid for it and told her that she could take the beer when she returned with the money. The sale was apparently made at that time, which was

12:30 a.m. The customer did not come back with the money until 4:00 a.m., at which time the claimant took the money and gave the customer the beer. The claimant was aware that he could not sell alcohol after 2:00 a.m., but was not aware that alcohol purchased prior to 2:00 a.m. could not leave the premises after 2:00 a.m. The claimant was never told that this was a violation of policy and he was unaware that it was a violation of policy. In its appeal letter the employer's representative states that the claimant was discharged for a violation of a reasonable known policy and that he let a customer walk out of the store with alcohol and he did not pay. This is in conflict with the statement by the representative accompanying the protest, which says nothing about failing to pay for the alcohol. There was no testimony to support the representative's statements. Accordingly, the administrative law judge concludes that there is not a preponderance of the evidence that the claimant's acts as established in the administrative file rise to the level of disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged, but not for disqualifying misconduct and, as a consequence, he is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant his disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided he is otherwise eligible.

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 administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$336.00 since separating from his employer on or about November 28, 2003 and filing for such benefits effective December 7, 2003 as follows: \$84.00 per week for four weeks from benefit week December 13, 2003 to benefit week ending January 3, 2004. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of January 7, 2004, reference 01, is affirmed. The claimant, Jesse J. Birmingham, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible. As a result of this decision the claimant is not overpaid any unemployment insurance benefits arising out of his separation from the employer herein.

b/b