

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

**JOZEF J HERMANSON**  
Claimant

**APPEAL NO. 18A-UI-08541-S1-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**THOMPSON TRUCK & TRAILER INC**  
Employer

**OC: 07/22/18**  
**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Jozef Hermanson (claimant) appealed a representative's August 9, 2018, decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits after his separation from employment with Thompson Truck & Trailer (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for September 4, 2018. The claimant participated personally. The employer participated by Sharon Lovetinsky, Interim Chief Financial Officer. The claimant offered and Exhibit A was received into evidence.

**ISSUE:**

The issue is whether the claimant was separated from employment for any disqualifying reason.

**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 hired on February 26, 2018, as a full-time service advisor. He signed for receipt of the employer's handbook and drug testing policy when he was hired. The policies provided alcohol testing under some circumstances. If an employee had an alcohol concentration level of .04 or higher, the employee is given the option to enter a rehabilitation program or resign. The employer did not issue the claimant any warnings during his employment.

On July 25, 2018, the claimant went to lunch at a restaurant. He ordered Chinese food and one beer. The owner and two other workers were also eating in the restaurant. They saw the claimant drink one beer with his lunch. When the claimant returned to work after lunch, the owner asked the claimant what he had for lunch. The claimant said he had Chinese food and one beer. The employer terminated the claimant without asking him to provide a sample for testing.

## REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The employer is entitled to perform testing in certain circumstances and to discharge upon the receipt of a positive result. Iowa Code Section 730.5(9)e requires that an employer establish in its written policy a standard for alcohol concentration that violates the policy and that concentration shall not be less than .04. The employer did not provide information to the claimant about an employee assistance program or other substance abuse programs as required by Iowa Code Section 730.5(9)(c).

The claimant was terminated for drinking one beer at lunch time, not for violating the employer's alcohol policy. The employer did not test the claimant, so there is no proof that the claimant violated the 0.04 alcohol policy. The employer did not adhere to its own policies when it

terminated the claimant without the benefit of a test or offer of rehabilitation. There has been no proof of misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

**DECISION:**

The representative's August 9, 2018, decision (reference 01) is reversed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

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Beth A. Scheetz  
Administrative Law Judge

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Decision Dated and Mailed

bas/rvs