

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOHNNY D SANDERS
Claimant

APPEAL NO. 09A-UI-15884-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**KAISER CONTRACT CLEANING
SPECIALIST INC**
Employer

OC: 09-27-09
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the October 16, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on November 19, 2009. The claimant did participate. The employer did participate through (representative) Margie Loeffelholz, Executive Secretary and Carlos Menendez, Site Manager.

ISSUE:

Was the claimant discharged for work-related misconduct?

FINDINGS OF FACT:

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: Claimant was employed as a laborer full time beginning September 7, 2005 through September 22, 2009 when he was discharged. The employer discharged the claimant because they believed him to be under the influence of alcohol while he was at work on September 22, 2009 in contravention to the employer's policy prohibiting employees from working while under the influence of alcohol.

The claimant worked on the day before, September 21, beginning at 6:00 p.m. until 2:00 a.m. When he returned home at approximately 2:30 a.m. he drank alcohol until 5:30 a.m. He slept most of the following day, then got up, showered, brushed his teeth, dressed in clean clothes and returned to work at 6:00 p.m. on September 22. Sometime between 10:00 p.m. and 11:00 p.m. Mr. Menendez began observing the claimant work. He noticed that the claimant seemed off balance and wobbly. Mr. Menendez approached the claimant and believed that he smelled alcohol on his breath and that the claimant appeared to be under the influence of alcohol. Mr. Menendez took the claimant off the line and into a conference room where he questioned him about whether he had been drinking alcohol prior to coming to work. The claimant admitted that he had been drinking the night before, but denied that he was under the influence of alcohol. Another supervisor also observed the claimant working on the line and smelled alcohol on the claimant's breath, but did not testify at the hearing. At the time Mr. Menendez questioned the claimant, the claimant did not allege that he smelled like alcohol

due to use of any mouthwash or breath mint. The employer did not send the claimant for any type of alcohol or breathalyzer test. At hearing the claimant denied being under the influence of alcohol while at work on September 22.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

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

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 issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988).

The claimant denies being under the influence of alcohol and Mr. Menendez alleges the claimant was under the influence of alcohol on September 22. No testing indicates whether the claimant had any alcohol in his system. Under such circumstances the administrative law judge concludes that the employer has not met their burden of proving misconduct. The employer's evidence does not establish that the claimant deliberately and intentionally acted in a manner he knew to be contrary to the employer's interests or standards. While the employer may have had good cause to discharge, conduct which might warrant a discharge from employment will not necessarily sustain a disqualification from job insurance benefits. *Budding v. Iowa Department of Job Service*, 337 N.W.2d 219 (Iowa App. 1983). Inasmuch as the employer has not established a current or final act of misconduct, benefits are allowed.

DECISION:

The October 16, 2009, reference 01, decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/css