

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LILLIE PERRY
Claimant

APPEAL NO: 11A-UI-07782-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SDH SERVICES WEST LLC
Employer

OC: 05/08/11

Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

SDH Services West, L.L.C. (employer) appealed a representative's June 2, 2011 decision (reference 01) that concluded Lillie Perry (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on July 12, 2011. The claimant participated in the hearing. Floyd Richardson appeared on the employer's behalf. During the hearing, Employer's Exhibits One and Two were entered into evidence. Based on the evidence, the arguments of the parties, a review of the law, and assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on or about December 15, 2009. She worked full time as a custodian at the employer's Iowa City, Iowa business client. Her primary work schedule was from 9:00 p.m. until 5:30 a.m. Her last day of work was May 2, 2011. The employer discharged her on May 4, 2011. The reason asserted for the discharge was reporting to work under the influence of alcohol.

The employer's policies prohibit employees from reporting for work under the influence of alcohol or other intoxicating substances. There had been a prior occasion where the employer suspected the claimant of reporting to work under the influence, but the claimant had denied consuming anything other than an over-the-counter pain medication, and the employer did not include the issue in the warning the claimant received for other issues at that time.

On May 2 the claimant reported for work at 9:00 p.m. Shortly after the group "huddle" meeting at the beginning of the shift, the claimant was called back into the office by the two shift supervisors. They accused her of smelling of alcohol. The claimant denied having consumed

alcohol that day. She had most recently consumed alcohol shortly after 12:00 a.m., about 21 hours prior to her shift. The supervisors reported to the general manager, Mr. Richardson, that the claimant smelled of alcohol, that her eyes were red, that she was having difficulty putting sentences together, and that she had admitted drinking earlier in the day. The employer concluded that she was under the influence of alcohol, and had her sent home for the day. On May 3 Mr. Richardson told the claimant not to come in to work, indicating the matter was still under investigation. When he inquired of the claimant regarding the incident, she further denied consuming any alcohol during the day or that she had been under the influence when she had reported for work. On May 4 the employer determined to discharge the claimant based upon the reports from the claimant's supervisors that she had reported for work at 9:00 p.m. under the influence of alcohol.

REASONING AND CONCLUSIONS OF LAW:

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. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, 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 is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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. 871 IAC 24.32(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is the conclusion that she had reported for work at 9:00 p.m. on May 2 under the influence of alcohol. "[A] person is 'under the influence' when the consumption of alcohol affects the person's reasoning or mental ability, impairs a person's judgment, visibly excites a person's emotions, or causes a person to lose control of bodily actions." See, State v. Truesdell, 679 N.W.2d 611, 616 (Iowa 2004). The employer based its conclusion that the claimant was under the influence when she reported for work exclusively on the second-hand accounts from the two shift supervisors; however, without that information being provided first-hand, the administrative law judge is unable to ascertain whether those supervisors might have been mistaken, whether they carefully or properly observed the claimant, or whether they are credible. The claimant denied the allegations in her

first-hand testimony. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant did in fact report to work "under the influence" on May 2. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's June 2, 2011 decision (reference 01) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs