

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

JOHN D KOHL
2214 MCKINLEY APT 3
CLINTON IA 52732

ECONOMY COATING SYSTEMS INC
PO BOX 20
CAMANCHE IA 52730-0020

Appeal Number: 05A-UI-11512-BT
OC: 10/16/05 R: 04
Claimant: Appellant (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

STATEMENT OF THE CASE:

John Kohl (claimant) appealed an unemployment insurance decision dated November 3, 2005, reference 01, which held that he was not eligible for unemployment insurance benefits because he was discharged from Economy Coating Systems, Inc. (employer) for work-connected misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on November 29, 2005. The claimant participated in the hearing. The employer participated through Robin Genko-Marcucci, Controller.

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 employed as a full-time fork truck operator from

August 30, 2004 through October 20, 2005. He was discharged because the employer learned he had been drinking beer while working on the evening of October 7, 2005 and on other days as well. The employer first learned about the behavior on October 14, 2005 when Justin Voss, a co-employee, came forward and reported the claimant's conduct. The claimant and another employee were both drinking. Mr. Voss reported that the claimant and Don Clark were sitting in a car which had been pulled up between the entrance door and the dumpster. They were drinking beer and this co-employee also reported that the claimant asked him to take him to a convenience store to get some beer and Mr. Voss refused. The claimant then asked Corey Nichols, who took him to the store and he bought beer. The claimant and Mr. Clark were in the car another night when it was parked in the same position, with the trunk open and beer in the trunk. On a separate Friday night, the claimant and Mr. Clark tried to get Joseph Jewell to drink with them and when Mr. Voss went out on break, he saw the three in the car drinking together.

Upon receiving the complaint, the employer began an investigation and found a surveillance tape that showed the claimant and Mr. Clark standing in the back of a car that was parked next to the building with its trunk open. The vehicles are supposed to be parked in a different location away from the building. It appeared the claimant had tried to park outside of the view of the surveillance tape so it could only be seen that they were drinking, not what they were drinking. The employer contacted Corey Nichols, who no longer worked for the employer, and asked him about taking the claimant to buy beer. Mr. Nichols confirmed that he took the claimant to purchase beer although he could not remember the specific date. He stated that the claimant bought beer and brought it out to the car. The claimant drank a beer before going back to work. The employer concluded the information was accurate and confronted the claimant about his actions. The claimant neither denied nor admitted drinking beer but simply accepted the fact that he had been discharged.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. 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.

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).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant was discharged for drinking beer while working on October 7, 2005. He was discharged on October 20 but that is because the employer did not learn about the incident until October 14, 2005. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act. 871 IAC 24.32(8). The employer acted promptly upon receipt of the information and the discharge is based on a current act.

The claimant denies drinking on the job but the evidence demonstrates it was more likely than not that he was drinking beer while working. In addition to the individual making the complaint, the employer had a separate witness provide information that confirmed the original complaint. This witness was no longer working for the employer and would have nothing to gain or lose by providing a statement. Furthermore, the employer had a surveillance tape that also supported the allegations even though not everything could be seen on the tape. The fact that the claimant did not deny the allegations when he was being discharged further convinced the employer that the allegations were true. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

DECISION:

The unemployment insurance decision dated November 3, 2005, reference 01, is affirmed. The claimant is not eligible to receive unemployment insurance benefits because he was discharged from work for misconduct. Benefits are withheld until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

sdb/s