

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**TERRY L BANKS**

Claimant

**APPEAL NO. 09A-UI-06940-H2T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**TYSON FRESH MEATS INC**

Employer

**OC: 04-05-09**

**Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

The claimant filed a timely appeal from the April 28, 2009, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on June 1, 2009. The claimant did participate. The employer did participate through Will Sager, Complex Human Resources Manager. Claimant's Exhibit A was received.

**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 production worker full time beginning March 4, 2008 through February 9, 2009 when he was discharged. The claimant was provided with a copy of the employer's drug and alcohol policy. He had been employed with the employer for less than one year. On September 5, 2008 the claimant was subjected to his first reasonable suspicion test when the employer believed him to be under the influence of alcohol while at work. He tested positive for alcohol after a breathalyzer test and chose to take a leave of absence to self-rehabilitate under the employer's alcohol policy. The employer's policy provides for only one instance of rehabilitation and any employee to have a second positive alcohol test is terminated.

On February 6, 2009 the claimant's supervisor smelled the odor of alcohol around the claimant and had another management official check to see if he smelled alcohol around the claimant. Both managers smelled the odor of alcohol around the claimant and he was sent to the medical department for a reasonable suspicion test for alcohol. The first breathalyzer test showed claimant had an alcohol level of .065. A second confirmatory test 15 minutes later showed his alcohol level of .054. The claimant admits that he had been drinking alcohol prior to coming to work that day.

## REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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 complied with the requirements of Iowa Code Chapter 730.5 regarding drug and alcohol testing. The claimant admitted use of alcohol prior to his work shift on February 6. He had an odor of alcohol about him that credibly led the employer to a reasonable suspicion test pursuant to their alcohol policy. The employer's alcohol test illustrated that the claimant's alcohol level was over .04 for both tests. He knew he was required to be alcohol free while on the job and had reviewed the employer's written policy. The claimant had previously tested positive for alcohol while on the job in September 2008 and was given the option of rehabilitation at that time. Under the Iowa Code and the employer's policy the claimant was not required to be offered rehabilitation a second time. The claimant's second positive alcohol test in February 2009 was misconduct sufficient to disqualify him from receipt of unemployment insurance benefits. Benefits are denied.

**DECISION:**

The April 28, 2009, reference 01 decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

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Teresa K. Hillary  
Administrative Law Judge

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Decision Dated and Mailed

tkh/pjs