

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ROOSEVELT SANDERS

Claimant

APPEAL NO: 10A-UI-11596-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

BIERSCH INC

Employer

OC: 06-13-10

Claimant: Appellant (2)

Section 96.5-2-a – Discharge/Misconduct

Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

The claimant filed an appeal from the July 26, 2010, reference 02, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on October 5, 2010. The claimant participated in the hearing. The employer did not respond to the hearing notice and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. Department's Exhibit D-1 was admitted into evidence.

ISSUES:

The issues are whether the claimant's appeal is timely and whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: A disqualification decision was mailed to the claimant's last-known address of record on July 26, 2010. The claimant received the decision. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by August 5, 2010. The appeal was not filed until August 18, 2010, which is after the date noticed on the disqualification decision. He testified he was out of town looking for work in Des Moines and then did a door job and then a roofing job before returning to Waterloo August 17, 2010. Consequently, the administrative law judge concludes the claimant filed the appeal as soon as possible after he received it. Therefore, the appeal is timely.

The claimant was employed as a full-time sheet metal machinist for Biersch from March 2004 to June 15, 2010. On May 26, 2010, several employees reported they felt the claimant was under the influence of alcohol while on the clock because they smelled the odor of alcohol, his eyes were glassy and his speech was affected. The employer talked to the claimant and his union steward about his condition and he became very agitated and attempted to leave the meeting several times after telling the employer he had a "late night" but did not drink at work. The employer informed him he needed to submit to alcohol testing and if he was found to be under

the influence he would not be disciplined but rather would have been required to undergo a substance abuse evaluation and alcohol treatment if recommended. The claimant refused to take the test and left the premises without permission. The employer suspended him pending further investigation. It met with the claimant and his union steward June 7, 2010, and he said he only had a "couple of beers" ending at 6:00 p.m. May 25, 2010, and the other employees were smelling his mouthwash. The employer did not believe that explanation accounted for the other behaviors it observed in the claimant May 26, 2010. The employer notified the claimant June 15, 2010, that his employment was terminated for refusal to submit to alcohol testing and for being under the influence of alcohol.

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 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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. 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.

The evidence suggests the claimant was under the influence of alcohol at work May 26, 2010, and he did refuse to submit to alcohol testing in violation of the employer's policy and Iowa law. While a refusal to take the test is grounds for immediate termination, the employer was fully aware of the facts May 26, 2010, but waited until June 15, 2010, three weeks later, to discharge the claimant for the incident. Because the employer had all of the pertinent facts May 26, 2010, but did not act on them at the time, the administrative law judge is forced to conclude the claimant was discharged for a past act of misconduct. Therefore, benefits must be allowed.

DECISION:

The July 26, 2010, reference 02, decision is reversed. The claimant's appeal is timely. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed provided he is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/css