

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

HEATH BERGMAN

Claimant

APPEAL NO. 10A-UI-12842-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WHITTERS INDUSTRIAL SERVICES LC

Employer

OC: 06/13/10

Claimant: Respondent (1)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, Whitters Industrial Services (Whitters), filed an appeal from a decision dated July 6, 2010, reference 01. The decision allowed benefits to the claimant, Heath Bergman. After due notice was issued, a hearing was held by telephone conference call on November 3, 2010. The claimant participated on his own behalf. The employer participated by Safety Director Jimmy Noethe.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Heath Bergman was employed by Whitters from August 10, 2008 until November 6, 2009 as a full-time laborer. The work crew was being assigned to a new site in Columbus, Nebraska, with a client that was very strict on its drug and alcohol policy. The employer verbally advised the work crew that even coming to work smelling like alcohol would be a violation of the code of conduct.

On November 6, 2009, Supervisor Rob Lathrop picked up the claimant for work and thought he smelled like alcohol. A few hours later, Mr. Bergman was taken to the Columbus Occupational Health Clinic and given a breathalyzer test and gave a urine sample for drug screening. Both tests came back negative. The employer still discharged the claimant for “smelling like alcohol.” Mr. Bergman maintained the clothes he was wearing were clean and had not been worn since their last laundering. He had not been drinking alcohol while wearing them or used any chemicals that might have smelled like liquor.

REASONING AND CONCLUSIONS OF LAW:

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.

The employer has the burden of proof to establish the claimant was discharged for substantial, job-related misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). In the present case, the only allegation against the claimant was that he "smelled like alcohol," but the employer did not provide testimony from Mr. Lathrop, the only eyewitness. The claimant's assertion he did not smell like alcohol, and had not worn the clothes while drinking or using any other chemical since their last cleaning, has not been rebutted by any competent testimony from the employer. If Mr. Lathrop thought the claimant smelled like alcohol, under these circumstances, it was not due to any action or activity on the part of the claimant and he cannot be held accountable for the supervisor's perceptions without further evidence and testimony.

The employer has failed to establish the claimant was guilty of any willful misconduct and disqualification may not be imposed.

DECISION:

The representative's decision of July 6, 2010, reference 01, is affirmed. Heath Bergman is qualified for benefits, provided he is otherwise eligible.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/kjw