

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DAVID L HARRISON
Claimant

APPEAL NO. 08A-UI-05782-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

FBG SERVICE CORPORATION
Employer

**OC: 05/18/08 R: 02
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the June 11, 2008, reference 01, decision that denied benefits. After due notice was issued, a telephone conference hearing was held on July 10, 2008. The claimant participated personally. The employer was represented by Josh Burrows, Attorney at Law, and participated through Louis Valenciano, Area Manager. The employer offered and Exhibit One was received into evidence.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

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 hired on March 20, 2001, as a full-time cleaning specialist. The claimant signed for receipt of the employer's handbook when he was hired.

On April 24, 2008, the claimant went home for break. He was not feeling well and took Robotusin. On his way driving back to work at the library at 2:00 a.m. a Newton, Iowa, police officer pulled the claimant over because his left tail light was out. The left tail light was known to go out on the claimant's older car when it was raining and it was raining that morning. The officer thought he smelled alcohol on the claimant and administered a number of alcohol tests. The claimant denied drinking. The claimant did not fail the test and was not legally intoxicated. The officer sent the claimant on his way. Later the police department notified the employer of the situation. On April 28, 2008, the employer terminated the claimant even though the claimant denied drinking. The employer thought the claimant was a good employee and had no problems with his performance. In July 2008, the claimant was diagnosed with diabetes.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for 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.

The employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The employer was unable to prove that the claimant engaged in any type of job misconduct. While the officer had an opinion about the claimant's smell, the officer felt the claimant was not intoxicated and let him drive away without a citation. Neither the officer nor the claimant knew the claimant would be diagnosed with diabetes. The employer has not provided sufficient evidence to prove misconduct. The claimant is eligible to receive unemployment insurance benefits.

DECISION:

The June 11, 2008, reference 01, representative's decision is affirmed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/css