

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ESAD OSMIC
Claimant

APPEAL NO. 09O-UI-06068-AT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BEEF PRODUCTS INC
Employer

OC: 01/25/09
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Esad Osmic filed a timely appeal from an unemployment insurance decision dated February 27, 2009, reference 01, that disqualified him for benefits. After due notice was issued, a telephone hearing was held by Administrative Law Judge Devon Lewis on March 26, 2009. Judge Lewis was unable to contact Mr. Osmic and ruled against him in a decision dated March 26, 2009 in appeal number 09A-UI-03300-LT. Mr. Osmic then appealed to the Employment Appeal Board which, in an order dated April 16, 2009, remanded the case for another hearing. Following due notice, a hearing was held May 11, 2009. Mr. Osmic participated on his own behalf. Rick Wood and Jennifer Stubbs participated for the employer, Beef Products, Inc. Aldijana Radoncic served as the interpreter. Employer Exhibit One was admitted into evidence.

ISSUE:

Was the claimant discharged for misconduct in connection with his employment?

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: Esad Osmic was a maintenance worker for Beef Products, Inc. from August 21, 2007 until he was discharged January 27, 2009. He was discharged for allegedly bringing a can of pop into a work area known as the Niro R room. Management found two cans of soda in the room along with two workers. Mr. Osmic denied that either can was his. The other employee acknowledged that one can was his but not the other. Assuming that the other can belonged to Mr. Osmic, he was discharged.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence establishes that the claimant was discharged for misconduct in connection with his employment. It does not.

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. See Iowa Code section 96.6-2. The employer's evidence consisted solely of circumstantial, hearsay evidence. The employer witnesses acknowledged that no one actually saw Mr. Osmic with a can of soda. Under oath, subject to questioning by the administrative law judge and cross-examination by the employer, the claimant's testimony did not waiver. At most, the employer's evidence indicates a 50/50 probability that one can of soda belonged to the claimant. This is not a preponderance of the evidence as it is not more likely that it belonged to him than that it did not. No disqualification may be imposed based upon the evidence in this record.

DECISION:

The unemployment insurance decision dated February 27, 2009, reference 01, is reversed. The claimant is entitled to receive unemployment insurance benefits, provided he is otherwise eligible.

Dan Anderson
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs