

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

KERRY A JOHNSON
Claimant

PACKERS SANITATION SERVICES INC
Employer

APPEAL 19A-UI-05292-LJ-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 05/26/19
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

On July 2, 2019, the employer filed an appeal from the June 24, 2019, (reference 01) unemployment insurance decision that allowed benefits based upon a determination that claimant was discharged and the employer failed to establish the discharge was for willful or deliberate misconduct. The parties were properly notified of the hearing. A telephonic hearing was held on July 26, 2019. The claimant, Kerry Johnson, participated. The employer, Packers Sanitation Services, Inc., participated through Marissa Rowen, Office Coordinator. Employer's Exhibits 1 through 5 were received and admitted into the record over objection. The administrative law judge took official notice of the administrative record.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for the employer on September 5, 2017. Claimant was employed full-time as a sanitation worker. Claimant's employment with this employer ended on May 20, 2019, when he was discharged for misconduct.

Claimant was a third-shift employee. He worked at the employer's plant in the Waterloo area. This plant employs approximately 160 employees.

On May 17, 2019, claimant got off work at 7:00 a.m. He then had several alcoholic drinks after work. Claimant then went to sleep. He woke up that evening and reported back to work at 11:00 p.m. for his scheduled shift. Several employees on claimant's shift reported that he appeared intoxicated. (Exhibits 2, 3, and 4) The employer called claimant into the office and

performed a breathalyzer test. Claimant blew a 0.08, which is above the legal limit for operating a motor vehicle in Iowa. At that point, claimant was given two options. He could go to the hospital and have a confirmatory test, or he could go home and be suspended pending an investigation. Claimant opted to go home. Claimant was discharged several days later for coming to work intoxicated and refusing the confirmatory test.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$2,726.00, since filing a claim with an effective date of May 26, 2019, for the eight weeks ending July 20, 2019. The administrative record also establishes that the employer did not participate in the fact-finding interview or make a first-hand witness available for rebuttal.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

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.

Iowa Admin. Code r. 871-24.32(1)a provides:

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); accord *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000).

The employer has the burden of proving disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). Whether an employee violated an employer's policies is a different issue from whether the employee is disqualified for misconduct for purposes of unemployment insurance benefits. See *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000) ("Misconduct serious enough to warrant the discharge of an employee is

not necessarily serious enough to warrant a denial of benefits.” (Quoting *Reigelsberger*, 500 N.W.2d at 66.)).

Testing under Iowa Code section 730.5(4) allows employers to test employees for drugs and/or alcohol but requires the employer “adhere to the requirements . . . concerning the conduct of such testing and the use and disposition of the results.” Iowa Code section 730.5(1)*i* allows drug testing of an employee upon “reasonable suspicion” that an employee’s faculties are impaired on the job or on an unannounced random basis.

Upon a positive drug screen, Iowa Code section 730.5(9)(g) requires, under certain circumstances, that an employer offer substance abuse evaluation and treatment to an employee the first time the employee has a positive alcohol test. The statute provides that if the employer has at least fifty employees, and if the employee has been employed by the employer for at least twelve of the preceding eighteen months, and if rehabilitation is agreed upon by the employee, and if the employee has not previously violated the employer’s substance abuse prevention policy, the written policy shall provide for the rehabilitation of the employee pursuant to subsection 10, paragraph “a”, subparagraph (1), and the apportionment of the costs of rehabilitation as provided by this paragraph “g”.

In this case, claimant was discharged for failing the on-site breathalyzer test and refusing the confirmatory test. Claimant was not told that he would be discharged if he refused to go to the hospital and take the confirmatory test. Rather, all the witness statements offered by the employer indicate claimant was simply offered two options, and claimant selected the option he preferred. Additionally, the employer did not offer claimant the opportunity for rehabilitation, which was its obligation under section 730.5(9)(g). The employer has not met its burden of establishing that claimant was discharged from employment for disqualifying misconduct. Benefits are allowed, provided claimant is otherwise eligible.

As claimant was discharged from employment for no disqualifying reason, the issues of overpayment, repayment, and chargeability are moot.

DECISION:

The June 24, 2019, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. The issues of overpayment, repayment, and chargeability are moot.

Elizabeth A. Johnson
Administrative Law Judge

Decision Dated and Mailed

lj/scn