

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

NICOLE M SCHMITZ
Claimant

IOC BLACK HAWK COUNTY INC
Employer

APPEAL NO. 18A-UI-09672-B2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 08/26/18
Claimant: Appellant (1)

Iowa Code § 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated September 12, 2018, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on October 4, 2018. Claimant participated personally. Employer participated by Tori Jermeland.

ISSUE:

The issue in this matter is whether 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: Claimant last worked for employer on August 24, 2018. Employer discharged claimant on August 24, 2018 because claimant refused a reasonable suspicion drug and alcohol test requested by employer.

Claimant was seen as unsteady, grinding her teeth, angry, and having outbursts on August 24, 2018. As per company policy, two salaried employees gave assessments of claimant as she appeared at work on that date to be acting erratically. They wrote down these assessments and contacted the security guard to take claimant for testing. When claimant was taken for testing, she'd spoken with other members of management. She asked to talk with her attorney about taking the drug test, but was told by employer that she needed to submit to the test at that time. Claimant was informed that her refusal to take the test would be grounds for dismissal. Claimant waived on whether she should take the test, but ultimately decided that she would not take the test, as she knew that she'd test positive because she'd taken pain medication earlier in the day. Claimant was terminated that day.

Claimant did have intermittent FMLA that was in effect the date of her testing. Claimant did not call in sick using her FMLA time on August 24, 2018, but instead chose to come to work after taking her pain medication.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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:

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982), Iowa Code § 96.5-2-a.

In order to establish misconduct as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. Rule 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa Ct. App. 1986). The conduct must show a 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 the employee's duties and obligations to the employer. Rule 871 IAC 24.32(1)a; *Huntoon supra*; *Henry supra*.

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. In this matter, the evidence established that claimant was discharged for an act of misconduct when claimant violated employer's policy concerning taking a reasonably requested drug and alcohol test based on reasonable suspicion that claimant was under the influence of intoxicants while at work.

Whereas claimant believed that she should be afforded benefits because she was not allowed to contact an attorney prior to making her decision on whether or not to take the drug test, such belief is not supported under Iowa law. This is not a criminal action that was brought against claimant, but rather a civil action that claimant had been alerted to when she received her Drug and Alcohol Policy from employer at the time of hire. Employer was not required to wait to conduct the testing until after claimant had contacted an attorney.

Claimant did not forward to employer documentation from her doctor indicating that claimant was to be allowed an accommodation to do her job after she'd taken pain medications. Absent this accommodation, claimant was reasonably expected to not be under intoxicants during work hours.

The last incident, which brought about the discharge, constitutes misconduct because claimant knew that she could be drug tested upon reasonable suspicion, and further knew that her refusal to test when requested could be grounds for her dismissal. The administrative law judge holds that claimant was discharged for an act of misconduct and, as such, is disqualified for the receipt of unemployment insurance benefits.

DECISION:

The decision of the representative dated September 12, 2018, reference 01, is affirmed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible.

Blair A. Bennett
Administrative Law Judge

Decision Dated and Mailed

bab/scn