

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

CINDY J SCHULTZ
Claimant

ALLSTEEL INC
Employer

APPEAL 19A-UI-10338-AD-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 12/01/19
Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting
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 December 30, 2019, AllSteel Inc. (employer/appellant) filed an appeal from the December 20, 2019 (reference 01) unemployment insurance decision that found Cindy Schultz (claimant/respondent) was eligible for benefits.

A telephone hearing was held on January 23, 2020 at 3 p.m. The parties were properly notified of the hearing. Employer participated by Hearing Representative Sandra Linsin. Member and Community Relations Representative Susie Sass participated as witnesses on behalf of employer. Claimant did not register a number for the hearing and did not participate.

Official notice was taken of claimant's payment history on the unemployment insurance database. Employer's Exhibits 1- 9 were admitted.

ISSUE(S):

- I. Was the separation a layoff, discharge for misconduct, or voluntary quit without good cause?
- II. Was the claimant overpaid benefits? Should claimant repay benefits or should employer be charged due to employer participation in fact finding?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

Claimant worked for employer as a full-time Assembler 1. In this position she worked on an assembly line, putting parts together for office furniture. Claimant's first day of employment was September 22, 2014. The last day claimant worked on the job was November 25, 2019. Claimant's immediate supervisor was Sofia Villalpando. Claimant separated from employment

on November 26, 2019. Claimant was discharged due to a second positive drug screen by Member and Community Relations Generalist Jessica Enriquez on that date.

Employer has a written drug and alcohol policy. Claimant was aware of the policy and was provided a copy of it. The policy allows for random testing of all employees, and employer randomly drug screens a portion of its work force every month. During orientation and yearly, employees review the drug and alcohol free policy and procedure. When an employee is selected for a drug screen, the employee's supervisor walks them to the area where the drug screens are taking place. The policy is in place because employees work with heavy machinery and an employee working under the influence of an illegal controlled substance is a threat to themselves and others. See Exhibits 5, 9.

Claimant tested positive for marijuana on July 16, 2018. See Exhibits 6, 7, 8. Following this positive test, claimant took part in employer's member assistance program. Claimant then returned to work. After an initial positive test, employer's policy allows for a drug screen every month for two years. See Exhibit 4.

Claimant tested positive for marijuana again on November 21, 2019. Claimant was notified of the second positive test via a phone call from the medical review officer and via a certified letter. The letter informed claimant she could request re-evaluation of the sample she provided at a lab of her choosing. Enriquez also called claimant to let her know she had received the second positive test and that her employment was terminated as a result. See Exhibits 1, 2, 3.

The unemployment insurance system shows claimant's weekly benefit amount is \$386.00. Claimant has not received any weekly benefits in the current claim year.

REASONING AND CONCLUSIONS OF LAW:

For the reasons set forth below, the December 20, 2019 (reference 01) unemployment insurance decision that determined claimant was eligible for benefits is REVERSED. Claimant is not eligible for benefits until she earns wages for insured work equal to ten times her weekly benefit amount, provided she meets all other eligibility requirements.

- I. Was the separation a layoff, discharge for misconduct, or voluntary quit without good cause?

Iowa Code § 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:

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).

Iowa Admin. Code r.871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984).

What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The focus of the administrative code definition of misconduct is on deliberate, intentional or culpable acts by the employee. *Id.* When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986).

Iowa Code section 730.5 allows drug testing of an employee if, among other conditions, the employer has "probable cause to believe that an employee's faculties are impaired on the job." Iowa Code section 730.5(9) requires that a written drug screen policy be provided to every employee subject to testing. Iowa Code section 730.5(7)(i)(1) mandates that an employer, upon a confirmed positive drug or alcohol test by a certified laboratory, notify the employee of the test results by certified mail return receipt requested, and the right to obtain a confirmatory test

before taking disciplinary action against an employee. 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 drug test. The Iowa Supreme Court has held that an employer may not “benefit from an unauthorized drug test by relying on it as a basis to disqualify an employee from unemployment compensation benefits.” *Eaton v. Emp’t Appeal Bd.*, 602 N.W.2d 553, 557, 558 (Iowa 1999).

The administrative law judge finds claimant’s separation was for substantial job-related misconduct. Employer has a legitimate interest in maintaining a drug-free workplace, as employees work with heavy machinery and doing so under the influence of an illegal controlled substance is a threat to that employee and others. Claimant was clearly aware of employer’s drug and alcohol free policy and chose to violate it. This was a deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees and a disregard of employer’s interests. Employer’s testing, protocols, policies, and notification were in compliance with Iowa law and therefore can be used as a basis to disqualify claimant from benefits.

II. Was the claimant overpaid benefits? Should claimant repay benefits and/or charge employer due to employer participation in fact finding?

Iowa Code section 96.3(7) provides, in pertinent part:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1)(a) If the department determines that an overpayment has been made, the charge for the overpayment against the employer’s account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

(b) However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual’s separation from employment.

The unemployment insurance system shows claimant’s weekly benefit amount is \$386.00. Claimant has not received any weekly benefits in the current claim year. Claimant has not been overpaid benefits.

DECISION:

The December 20, 2019 (reference 01) unemployment insurance decision that determined claimant was eligible for benefits is REVERSED. Claimant is not eligible for benefits until she earns wages for insured work equal to ten times her weekly benefit amount, provided she meets all other eligibility requirements

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Decision Dated and Mailed

abd/scn