

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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**JEFFREY P FREE**  
Claimant

**K & W ELECTRIC INC**  
Employer

**APPEAL 15A-UI-11484-JCT**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 09/20/15**  
**Claimant: Appellant (2)**

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Iowa Code § 96.5(2)a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the October 7, 2015, (reference 01) unemployment insurance decision that denied benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on October 29, 2015. The claimant participated personally. The employer participated through Nick Steinkamp, vice president. Employer Exhibits One through Three were admitted into evidence.

**ISSUE:**

Was the claimant discharged for disqualifying job-related misconduct?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as an estimator and was separated from employment on September 10, 2015, when he was discharged for refusal to submit to a drug and alcohol screening.

The employer has policies which prohibit the use of or being under the influence of alcohol or drugs while at the work place (Employer Exhibits One and Three.) Amongst the reasons an employee may be requested to submit to a drug and alcohol screening is for reasonable suspicion (Employer Exhibits One and Three.) The claimant was made aware of the employer's policies at the time of hire (Employer Exhibits One and Three), and the employer utilized its safety director to requests the tests of employees.

During the claimant's final shift, he left around 2:45 p.m., to visit a job site and stop by his old neighborhood near the site, on the way back. The claimant returned around 4:45 p.m. and checked his time card, and dropped off paperwork from the job site. The claimant said goodbye to Mr. Steinkamp and the safety director upon locking up the site. The claimant usually drives a vehicle with a court-ordered ignition interlock device installed, which requires him to blow into a breathalyzer before operating a vehicle, but had discontinued recently, which concerned Mr. Steinkamp. While driving home, Mr. Steinkamp called the claimant and requested he return to the employer's job site to meet with the safety director. The employer also indicated the

safety director was unsure about requesting a drug and alcohol screening and Mr. Steinkamp told him, "I want it." The claimant assumed he was unlocking the door for the director who travels and didn't have keys, but was instead asked if he had been drinking. The claimant denied drinking. He was then asked to submit to an alcohol and drug screening, and he refused saying it was after work and he needed to get home for a 6:00 dinner appointment. Mr. Steinkamp called him while he drove home and advised if he refused, he would be discharged. The claimant refused and was subsequently discharged.

The employer produced four written statements of reasonable suspicion (Employer Exhibit Two). Of the four witnesses, Mr. Steinkamp attended the hearing, and his statement was dated September 17, 2015, one week after the separation.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was not discharged from employment due to job-related misconduct.

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(4) provides:

(4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

The question of whether the refusal to perform a specific task constitutes misconduct must be determined by evaluating both the reasonableness of the employer's request in light of all circumstances and the employee's reason for noncompliance. *Endicott v. Iowa Dep't of Job Serv.*, 367 N.W.2d 300 (Iowa Ct. App. 1985). In this case, the claimant worked his entire shift, and was either on the way out the door, or driving home when confronted about allegedly being under the influence. The employer testified that the safety director wasn't sure about conducting the test and asked Mr. Steinkamp who said "I want him tested." Further, it is unclear why the employer would permit Mr. Free to continue driving while believing he was under the influence, and in light of his denial of being under the influence. Mr. Steinkamp directed the claimant to drive back to work, believing he was under the influence to a degree that would warrant drug and alcohol testing, and again allowed him to drive home, nearly one hour after his shift had ended. The employer's request under the circumstances was not reasonable, considering the claimant had worked approximately a 10-hour shift and it wasn't until the final few minutes before it ended that he was approached to submit to the alcohol and drug screening. Based on the evidence presented, Mr. Free's refusal under the circumstances was not unreasonable.

Rather, the administrative law judge concludes that the claimant's refusal was an isolated incident of poor judgment and inasmuch as the employer had not previously warned the claimant about the issue leading to the separation, it has not met the burden of proof to establish that the claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given.

Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for disqualifying work-connected misconduct as defined by the unemployment insurance law. Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant's conduct leading separation was misconduct under Iowa law. Since the employer has not met its burden of proof, benefits are allowed.

**DECISION:**

The October 7, 2015, (reference 01) unemployment insurance decision is reversed. The claimant was not discharged from employment due to job-related misconduct. Benefits are allowed.

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Jennifer L. Coe  
Administrative Law Judge

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Decision Dated and Mailed

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