

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**GAVIN L CLARK**  
Claimant

**SEDONA STAFFING INC.**  
Employer

**APPEAL 21A-UI-09612-DZ-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 03/29/20**  
**Claimant: Respondent (4)**

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Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Code § 96.5(1) – Voluntary Quit  
Iowa Code § 96.5(1)j – Voluntary Quitting – Temporary Employment  
Iowa Admin. Code r. 871-24.10 – Employer Participation in Fact-Finding Interview  
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment  
PL 116-136, Sec. 2104 – Federal Pandemic Unemployment Compensation and Lost Wages Assistance Program  
PL 116-136, Sec. 2107 – Pandemic Emergency Unemployment Compensation

**STATEMENT OF THE CASE:**

Sedona Staffing Inc., the employer/appellant, filed an appeal from the March 22, 2021, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on June 18, 2021. The employer participated through Colleen McGuinty, unemployment insurance administrator and Julie White account manager. Mr. Clark did not register for the hearing and did not participate. Official notice was taken of the administrative record. Employer's Exhibit 1 was admitted into evidence.

**ISSUE:**

Was Mr. Clark laid off, discharged for disqualifying job-related misconduct or did he voluntarily quit without good cause attributable to the employer?  
Was Mr. Clark overpaid benefits?  
If so, should he repay the benefits?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Clark began working for the employer on July 8, 2019. He worked as a full-time production worker on assignment to HWH Corporation.

From April 20, 2020 through May 17, 2020, Mr. Clark did not work due to the COVID-19 pandemic. However, the employer paid him non-work pay for that entire time period. Mr. Clark was otherwise employed with the employer from March 29, 2020, the effective date of his claim, until September 8 2020, when the employer terminated his employment because he failed a drug test.

The employer's policy, in relevant part, prohibits the use of any amount of narcotics or other illegal drugs on the company premises or a client's premises while performing an assignment. The policy authorizes pre-employment, random and for-cause drug testing for alcohol, amphetamines, barbiturates, cocaine, opiates, methadone, THC/marijuana and other drugs. Tests are administered by a certified lab. The lab uses a split sample. Test results are sent to a medical review officer (MRO) who discusses the results with the person who was tested. The employer sends the results to the person who was tested via certified mail and lets the person know that they can have the second half of the sample tested at their own expense. Mr. Clark acknowledged receiving a copy of the policy on December 10, 2018.

While at work, Mr. Clark was lifting a tub of parts and injured his right hand. As a result of the workplace injury, Mr. Clark was sent for a urine drug test at a certified lab. The certified lab results showed that Mr. Clark tested positive for amphetamines and methamphetamine. The MRO discussed the results with Mr. Clark. The employer's witnesses could not provide information on whether the MRO gave Mr. Clark the opportunity to provide relevant information to the test, including identification of prescription or nonprescription drugs currently or recently used, or other relevant medical information. On September 8, 2020, the employer sent Mr. Clark the test results via certified mail and told him that he had the option to test the second half of the sample at his own expense. The employer also terminated his employment that day.

Mr. Clark did not get the second half of the sample tested but he took a new drug test. The employer rejected the results of the separate drug test.

Employer's Exhibit 1 shows that the employer paid Mr. Clark from March 29, 2020, the effective date of his claim, through September 8, 2020. Mr. Clark reported \$0.00 in wages from March 29, 2020 through September 8, 2020 when he filed his weekly claims.

Mr. Clark received \$6,187.00 in REGULAR unemployment insurance (UI) benefits from March 29, 2020 through September 12, 2020, \$9,600.00 in Federal Pandemic Unemployment Compensation (FPUC) and \$1,800.00 in Lost Wages Assistance Program (LWAP) benefits.

The employer did not participate in the fact-finding interview.

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

For the reasons that follow, the administrative law judge concludes Mr. Clark was employed with this employer from March 29, 2020 through September 8, 2020, he was not laid off on March 29, 2020, and he was discharged from employment on September 8, 2020 for no disqualifying reason.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

871 IAC 24.32(4) provides:

*Report required.* The claimant's statement and 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.

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). 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). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

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. Iowa Code § 730.5(4). Testing shall include confirmation of initial positive test results. For breathalyzer testing, initial and confirmatory testing may be conducted pursuant to the employer's written policy. A policy shall include requirements governing breath testing devices, alcohol screening devices, and qualifications for administering personnel consistent with DOT rules. If an oral fluid sample is taken and results are received in the presence of the employee, this is considered a sufficient sample for split sample testing. Iowa Code § 730.5(7)*f*. Iowa Code section 730.5(7)(i)(1) mandates that if a medical review officer (MRO) reports a positive test result to the employer, upon a confirmed positive drug or alcohol test by a certified laboratory, the employer must notify the employee of the test results by certified mail return receipt requested, and the right to obtain a confirmatory or split-sample test before taking disciplinary action against an employee.

Iowa Code section 730.5(9) requires that a written drug screen policy be provided to every employee subject to testing. 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". Iowa Code section 730.5(10)(a)(1) provides that the employer may require that the employee enroll in an employer-provided or approved rehabilitation, treatment, or counseling program, which may include additional drug or alcohol testing, participation in and successful completion of which may be a condition of continued employment, and the costs of which may or may not be covered by the employer's health plan or policies.

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. Iowa Emp't Appeal Bd.*, 602 N.W.2d 553, 557, 558 (Iowa 1999).

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. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

In this case, Mr. Clark was employed with this employer from March 29, 2020 through September 8, 2020. Furthermore, the employer has failed to establish misconduct on the part of Mr. Clark. The employer provided no evidence that Mr. Clark used illegal drugs *on the company premises or a client's premises while performing an assignment*, in violation of its policy. In addition, the employer failed to show that Mr. Clark was given an opportunity to provide relevant information to the test, including identification of prescription or nonprescription drugs currently or recently used, or other relevant medical information. The employer has not met its burden to prove it discharged Mr. Clark for misconduct under Iowa law. Thus, the employer cannot use the results of the drug screen as a basis for disqualification from benefits. Benefits are denied from March 29, 2020 through September 8, 2020 when Mr. Clark was employed with this employer, and benefits are allowed as of September 9, 2020, provided Mr. Clark is otherwise eligible.

The administrative law judge further concludes Mr. Clark has been overpaid REGULAR UI benefits in the amount of \$6,187.00; he has been overpaid FPUC benefits in the amount of \$9,600.00; and he has been overpaid LWAP benefits in the amount of \$1,800.00. Mr. Clark is not required to repay the REGULAR UI benefits because the employer did not participate in the fact-finding interview due to no fault of its own. Mr. Clark is required to repay the \$9,600.00 in FPUC benefits and \$1,800.00 in LWAP benefits he received.

Iowa Code §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.

Iowa Admin. Code r. 871-24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)"b" as amended by 2008 Iowa Acts, Senate File 2160.

PL116-136, Sec. 2104 provides, in pertinent part:

(b) Provisions of Agreement

(1) Federal pandemic unemployment compensation.--Any agreement under this section shall provide that the State agency of the State will make payments of regular compensation to individuals in amounts and to the extent that they would be determined if the State law of the State were applied, with respect to any week for which the individual is (disregarding this section) otherwise entitled under the State law to receive regular compensation, as if such State law had been modified in a manner such that the amount of regular compensation (including dependents' allowances) payable for any week shall be equal to

(A) the amount determined under the State law (before the application of this paragraph), plus

(B) an additional amount of \$600 (in this section referred to as "Federal Pandemic Unemployment Compensation").

....

(f) Fraud and Overpayments

(2) Repayment.--In the case of individuals who have received amounts of Federal Pandemic Unemployment Compensation to which they were not entitled, the State shall require such individuals to repay the amounts of such Federal Pandemic Unemployment Compensation to the State agency...

Mr. Clark has been overpaid REGULAR UI benefits in the amount of \$6,187.00 as he was not qualified and/or was ineligible to receive REGULAR UI benefits from March 29, 2020 through September 8, 2020. However, since the employer did not participate in the fact-finding interview, Mr. Clark is not required to repay these benefits.

Because Mr. Clark is disqualified from receiving regular UI benefits, he is also disqualified from receiving FPUC benefits and LWAP. While Iowa law does not require a claimant to repay regular UI benefits when the employer does not participate in the fact-finding interview, the CARES Act makes no such exception for the repayment of FPUC benefits or LWAP benefits. Therefore, the determination of whether Mr. Clark must repay FPUC and LWAP benefits does

not hinge on the employer's participation in the fact-finding interview. The administrative law judge concludes that Mr. Clark has been overpaid FPUC benefits in the gross amount of \$9,600.00, which must be repaid. The administrative law judge further concludes that Mr. Clark has been overpaid LWAP benefits in the gross amount of \$1,800.00, which must be repaid.

**DECISION:**

The March 22, 2021, (reference 01) unemployment insurance decision is modified in favor of the appellant, the employer. Mr. Clark was employed with this employer from March 29, 2020 through September 8, 2020. Benefits are denied during this time period.

Mr. Clark was discharged from employment for no disqualifying reason on September 8, 2020. Benefits are allowed as of September 9, 2020, provided he is otherwise eligible.

Mr. Clark has been overpaid REGULAR UI benefits in the amount of \$6,187.00, but he is not obligated to repay those benefits since the employer did not participate in the fact-finding interview. The employer's account shall not be charged and the overpayment shall be charged to the fund.

Mr. Clark has been overpaid FPUC benefits in the amount of \$9,600.00, which must be repaid. Mr. Clark has been overpaid LWAP benefits in the amount of \$1,800.00, which must be repaid.



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Daniel Zeno  
Administrative Law Judge  
Unemployment Insurance Appeals Bureau  
Iowa Workforce Development  
1000 East Grand Avenue  
Des Moines, Iowa 50319-0209  
Fax 515-478-3528

July 2, 2021  
Decision Dated and Mailed

dz/lj

**NOTE TO CLAIMANT:**

- This decision determines you have been overpaid FPUC benefits. If you disagree with this decision, you may file an appeal to the Employment Appeal Board by following the instructions on the first page of this decision.

- You may also request a waiver of this overpayment either 1) online, OR 2) in writing by mail.
- The **online request form** is available on the Iowa Workforce Development website at: <https://www.iowaworkforcedevelopment.gov/federal-unemployment-insurance-overpayment-recovery>
- The **written request** must include the following information:
  1. Claimant name & address.
  2. Decision number/date of decision.
  3. Dollar amount of overpayment requested for waiver.
  4. Relevant facts that you feel would justify a waiver.
- The request should be sent to:

Iowa Workforce Development  
Overpayment waiver request  
1000 East Grand Avenue  
Des Moines, IA 50319
- If this decision becomes final and you are not eligible for a waiver, you will have to repay the benefits you received.