

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MELODY A JOHNSON
Claimant

APPEAL 21A-UI-22236-DZ-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

BLACKHAWK SERVICES CORP
Employer

**OC: 06/06/21
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quit
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

STATEMENT OF THE CASE:

Blackhawk Services Corp, the claimant/appellant, filed an appeal from the September 24, 2021, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on November 29, 2021. The employer participated through Laurie Grey, human resources manager, Jenna Rice, Insperity hearing representative, and Nora Lee Macauley, Insperity hearing representative (observing). Ms. Johnson did not call in to the toll-free number and did not participate in the hearing.

ISSUE:

Was Ms. Johnson discharged for disqualifying job-related misconduct?
Was Ms. Johnson overpaid benefits?
If so, should she repay the benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Ms. Johnson began working for the employer on April 27, 2020. She worked as a full-time production laborer. Her employment ended on June 2, 2021.

The employer's policy prohibits the use, purchase, transfer or possession of illegal drugs or alcohol while at work or while on the employer's premises. The policy lists the prohibited drugs, including cocaine. The policy, in pertinent part, provides for post-accident drug testing. The policy provides that the employer may discipline an employee who is found to have any amount of illegal drug or alcohol in their body up to, and including, termination of employment. Ms. Johnson acknowledged receiving the policy on her hire date.

On May 19, 2021, Ms. Johnson fell at work. Ms. Johnson went to the emergency room. She was placed on worker's compensation leave. No drug test was conducted at the emergency

room. Ms. Johnson was tested for drugs the next day at the employer's worker compensation provider, Great River Business Health in West Burlington, Iowa. The drug test was a five panel urine test. The test conducted per the employer's policy and not due to any U.S. Department of Transportation (DOT) regulations.

On, or about, June 1, Great River Business Health contacted Ms. Johnson and told her that she had tested positive for cocaine. The employer was unsure of how Great River Business Health contacted Ms. Johnson. That same day, the employer received Ms. Johnson's test results from Great River Business Health. Ms. Grey called Ms. Johnson and told her that her employment was terminated because of the positive drug test. Ms. Grey told Ms. Johnson that she could reapply to work for the employer after sixty days if she would pass a drug test. Ms. Grey did not make any other offers to Ms. Johnson. The employer did not send the test results to Ms. Johnson via mail and did not tell Ms. Johnson that she could have a confirmatory test performed.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes Ms. Johnson was discharged from employment 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 law allows drug testing of an employee. Testing shall include confirmation of initial positive test results. 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. 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(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, the employer did not notify Ms. Johnson of the test results by certified mail return receipt requested and the employer did not inform Ms. Johnson of her right to obtain a confirmatory or split-sample test before taking disciplinary action against her. The employer simply terminated Ms. Johnson’s employment when it received the test results. The employer cannot use the results of the drug screen as a basis for disqualification from benefits. The employer has not met its burden to prove it discharged Ms. Johnson for misconduct under Iowa law. Benefits are allowed.

Since Ms. Johnson is eligible for benefits, she is not overpaid either REGULAR unemployment insurance benefits or Federal Pandemic Unemployment Compensation (FPUC) benefits.

DECISION:

The September 24, 2021, (reference 01) unemployment insurance decision is affirmed. Ms. Johnson was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Ms. Johnson is not overpaid either REGULAR unemployment insurance benefits or Federal Pandemic Unemployment Compensation (FPUC) benefits since she is eligible for benefits.



Daniel Zeno
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January 6, 2022
Decision Dated and Mailed

dz/mh