

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

**RICHARD KJOSE**  
Claimant

**APPEAL NO. 08A-UI-08211-ET**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WALGREEN CO**  
Employer

**OC: 08-10-08 R: 03**  
**Claimant: Respondent (2/R)**

Section 96.5-2-a – Discharge/Misconduct

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the September 4, 2008, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on September 29, 2008. The claimant participated in the hearing. Ron Frank, Store Manager; Kevin Schmidt, District Manager; and Judy Gentry, Employer Representative, participated in the hearing on behalf of the employer.

**ISSUE:**

The issue is whether the employer discharged the claimant for work-connected misconduct.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as full-time assistant manager for Walgreens from October 12, 2000 to August 15, 2008. He self-reported an alcohol dependency to the employer and was sent to a treatment program. On June 26, 2008, the claimant signed a return-to-work agreement and on July 2, 2008, the parties signed a last-chance agreement stating the claimant would take part in the testing program; provide a doctor's note if he could not report for the test; abstain from using alcohol; demonstrate appropriate work behavior and performance; document continued participation in aftercare twice a week for six weeks; attend five self-help meetings per week; and submit to random alcohol testing for five years. The claimant was required to call in to an outside agency every day before 10:00 p.m. eastern standard time to see if he was required to submit to testing that day. The employer explained to the claimant that he should call early enough that if he was required to test that day he would have time to get to the facility and provide a sample before that office closed. On July 3, 2008, the claimant did not call in to see if he needed to be tested because his cell phone was not working and the number to call was stored on his cell phone. On August 4 or 5, 2008, the employer received a letter and an e-mail stating the claimant missed his tests July 3 and July 29, 2008. The claimant called at 10:00 p.m. central standard time July 29, 2008, and the agency was closed. The employer met with the claimant August 8 or 9, 2008, and notified him that his employment was terminated August 15, 2008, for violating provisions of the last-chance agreement.

The claimant has claimed and received unemployment insurance benefits since his separation from this employer.

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

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job misconduct.

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.

The employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant signed a last-chance agreement July 2, 2008, after self-reporting a problem with alcohol. He was required to call in to an outside agency everyday and report for testing when asked. It seems that he could have recharged his cell phone July 3, 2008, to get the phone number he needed to call and should have understood he needed to call by 10:00 p.m. eastern standard time and call in time to go to the testing site if asked. Under these circumstances, the administrative law judge concludes the claimant's conduct violated the last-chance agreement and demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Benefits are denied.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code section 96.3-7. In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

**DECISION:**

The September 4, 2008, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

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Julie Elder  
Administrative Law Judge

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Decision Dated and Mailed

je/css