

**IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI**

**DAVID W SCHMIDT
262 N BLUFF BLVD - APT 308
CLINTON IA 52732**

**JT CULLEN
PO BOX 311
FULTON IL 61252**

**Appeal Number: 05A-UI-08028-RT
OC: 07-03-05 R: 04
Claimant: Respondent (2)**

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, JT Cullen, filed a timely appeal from an unemployment insurance decision dated July 29, 2005, reference 03, allowing unemployment insurance benefits to the claimant, David W. Schmidt. After due notice was issued, a telephone hearing was held on August 22, 2005, with the claimant participating. David Jones, Plant Manager and John Mucci, 2nd Shift Group Leader, participated in the hearing for the employer. Janis Johnson, Scott Skipper, and Travis Peter, were available to testify for the employer but not called because their testimony would have been repetitive and unnecessary. Employer's Exhibits 1 and 2 were admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibits 1 and 2, the administrative law judge finds: The claimant was employed by the employer as a full-time welder from January 12, 2005, until he was discharged on June 1, 2005. The claimant had also been previously employed by the employer. The claimant was discharged for an altercation with a co-worker on May 25, 2005, and for a positive drug test pursuant to the employer's drug testing policy. On May 25, 2005, the claimant was involved in an altercation with a co-worker, Casey Kindle. They were yelling at each other and pointing fingers at each other. They were both reprimanded by John Mucci, 2nd Shift Group Leader, and sent back to work. Mr. Mucci left a note concerning this incident for David Jones, Plant Manager. Mr. Jones received the note the next day and Mr. Jones conducted an investigation. Mr. Mucci also conducted an investigation. The investigations revealed that the altercation between the two had to do with a marijuana deal between the two workers and the payment of \$100.00. The claimant was then suspended on May 26, 2005, pending further investigation.

Because of the results of the investigation and the marijuana deal between the two, the claimant was brought in on May 31, 2005, and taken to Bluff Occupational Integrated Health Services, in Iowa, for a drug test pursuant to the employer's drug testing policy. The employer has a drug testing policy, which appears at Employer's Exhibit 1. The claimant received a copy of this policy, signed an acknowledgement therefore, and was aware of the drug testing policy. The policy provides for a drug test upon reasonable cause. The policy further provides that upon a positive test for drugs, including marijuana, the employee will be discharged. The employer had reasonable cause for the claimant's drug test. A urine sample was taken from the claimant by Bluff Occupational Integrated Health Services on May 31, 2005, with due regard to the claimant's privacy. The sample was split. The sample was tested by Bluff Occupational Integrated Health Services and found to be positive for marijuana, as shown at Employer's Exhibit 2. The employer had no chain of custody for the urine sample, but the urine sample was taken by Bluff Occupational Integrated Health Services, who conducted the test. The employer learned of the positive drug test, and brought the claimant back to the employer's location on June 1, 2005, and told the claimant that he was discharged for the altercation with the co-worker on May 25, 2005, and the positive drug test. The claimant was not otherwise contacted by anyone at the employer concerning the positive drug test results, nor was he contacted by the employer's medical review officer. The claimant received nothing in the mail concerning the results of the drug test. The employer's plant is located in Illinois, and the employer has no offices or plants in Iowa. The claimant worked for the employer in Illinois. The claimant resides in Iowa. Bluff Occupational Integrated Health Services is a medical facility in Iowa. The claimant's drug test and the employer's drug testing policy are not required by federal law.

Pursuant to his claim for unemployment insurance benefits filed effective July 3, 2005, the claimant has received unemployment insurance benefits in the amount of \$1,631.00 as follows: \$233.00 per week for seven weeks, from benefit week ending July 9, 2005 to benefit week ending August 20, 2005.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was.

2. Whether the claimant is overpaid unemployment insurance benefits. He is.

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).

The parties agree, and the administrative law judge concludes, that the claimant was discharged on June 1, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The claimant was discharged for two reasons; an incident with a co-worker on May 25, 2005, over a marijuana deal, and a positive drug test for marijuana under the employer's drug testing policy.

Concerning the altercation with the co-worker, the administrative law judge concludes that there is a preponderance of the evidence that the claimant entered into an altercation with a co-worker, Casey Kindle, on May 25, 2005. The employer's witness, John Mucci, 2nd Shift Group Leader, credibly testified that he observed both individuals yelling at each other and

pointing fingers. He took them both into his office and admonished them and sent them back to work. Mr. Mucci credibly testified that he began an investigation that resulted in the determination that the altercation had been over some kind of a marijuana deal between the two that had apparently gone sour. The employer's other witness, David Jones, Plant Manager, also credibly testified that he too had conducted an investigation and reached the same conclusion that the altercation was due to some drug deal between the two. The claimant's testimony to the contrary is not credible. The claimant's testimony is directly contradicted by Mr. Mucci, who was present and observed personally, the altercation. Mr. Jones also credibly testified that the claimant told him that the altercation involved some kind of marijuana deal between the claimant and Mr. Kindle or the friend of the claimant's and Mr. Kindle. The employer has a drug and alcohol policy at Employer's Exhibit 1 that clearly provides for a drug free work place and prohibits drug activity. The administrative law judge concludes that there is a preponderance of the evidence that the claimant was involved in an altercation with a co-worker over some kind of marijuana deal, and that this was in violation of the employer's policy and that this altercation and the drug deal was a deliberate act constituting a material breach of the claimant's duties and obligations arising out of his worker's contract of employment and evinces a willful and wanton disregard of the employer's interest and is disqualifying misconduct.

The other reason given for the claimant's discharge was a positive drug test, under the employer's drug testing policy. The evidence establishes that the claimant was taken to Bluff Occupational Integrated Health Services, where a urine sample was taken from the claimant and tested and found to be positive for marijuana, as shown at Employer's Exhibit 2. The drug test administered to the claimant was performed under the employer's reasonable cause testing provision. The administrative law judge concludes that under that policy the employer had reasonable cause under the facts and circumstances here to require a drug test. The drug test was performed on the urine sample by Bluff Occupational Integrated Health Services and found to be positive. The employer's location is in Illinois and the employer has no employment in Iowa. The administrative law judge concludes that the Iowa drug testing law according to Iowa Code section 730.5 is not applicable here, because the claimant worked in Illinois for an Illinois employer. Illinois appears to have no drug testing laws applicable to the fact here or that prohibit such drug testing or invalidate the results of such a drug test. The employer's drug testing policy calls for a discharge upon a positive drug test. The claimant had a positive drug test. Accordingly, the administrative law judge concludes that the employer's drug test was a valid drug test under Illinois law and was disqualifying misconduct. See Robinson v. IDES, 264 Ill. App. 3d 659, 637 NE 2d 631 (Ill. App. 1994). The administrative law judge specifically notes that there was no federal reason for the drug test or the employer's drug testing policy so as to trigger the application of federal rules concerning drug tests.

In summary, and for all the reasons set out above, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he requalifies for such benefits.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$1,631.00, since separating from the employer herein on or about June 1, 2005, and filing for such benefits effective July 3, 2005. The administrative law judge further concludes that the claimant is not entitled to these benefits and is overpaid such benefits. The administrative law judge finally concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of July 29, 2005, reference 03, is reversed. The claimant, David W. Schmidt, is not entitled to receive unemployment insurance benefits, until or unless he requalifies for such benefits, because he was discharged for disqualifying misconduct. He has been overpaid unemployment insurance benefits in the amount of \$1,631.00.

dj/pjs