

**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**

**ALTON B COLE  
308 S MULBERRY ST  
SIOUX CITY IA 51106**

**SIOUX CITY COMMUNITY SCHOOL DIST  
ATTN STEVE CRARY  
1221 PIERCE  
SIOUX CITY IA 51105**

**RICHARD STURGEON  
PO BOX 3372  
SIOUX CITY IA 51102-3372**

**Appeal Number: 04A-UI-12389-JTT  
OC: 10/24/04-04 R: 01  
Claimant: Appellant (2R)**

**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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

Claimant, Alton Cole, filed a timely appeal from a decision of a representative dated November 10, 2004, reference 01, which held Mr. Cole was not eligible to receive unemployment insurance benefits. After due notice was issued, a telephone conference hearing was scheduled for and held on December 15, 2004. The claimant was represented by Richard Sturgeon, Workers' Advocate, and participated personally. Sioux City Community School District was represented by Steve Crary, Director of Human Resources.

**FINDINGS OF FACT:**

Having heard the testimony of the witnesses and having reviewed all of the evidence in the record, the administrative law judge finds: Ms. Cole was employed by the Sioux City

Community School District as a full-time maintenance mechanic from August 27, 1984 until he was discharged by Ray Rowe, Assistant Director of Operations and Maintenance, on October 15, 2004, for alleged misconduct.

The final incident that prompted the school district to discharge Mr. Cole occurred on October 15, 2004. On that date, Mr. Cole voluntarily terminated his participation in a substance abuse treatment program the school district had instructed him to complete as part of a formal employee assistance program referral.

Mr. Cole's primary duties were to assist with indoor and outdoor maintenance for the school district. As part of his secondary duties, Mr. Cole could be called upon to operate a dump truck or school bus. The school district had not used Mr. Cole as a substitute bus driver in several years. Mr. Cole was seldom called upon to drive a vehicle that required a commercial driver's license. However, the school district required Mr. Cole to maintain a commercial driver's license (CDL). As the holder of a CDL, Mr. Cole was subject to random drug testing.

On September 28, pursuant to a random drug screening, Mr. Cole provided a urine sample that tested positive for marijuana. There is no evidence that Mr. Cole's CDL was affected by the positive drug screen. On September 30, Mr. Crary and Mel McKern, Director of Operations and Maintenance, met with Mr. Cole with regard to the positive drug test result. Mr. Crary and Mr. McKern advised Mr. Cole that, in lieu of immediate termination, the school district was placing Mr. Cole on paid suspension and requiring him to participate in substance abuse evaluation and treatment. Once Mr. Cole had commenced the substance abuse treatment and provided a negative drug test, he would be allowed to come back to work, but would be limited to "non-sensitive" duties until he successfully completed treatment. Mr. Crary and Mr. McKern advised Mr. Cole that in the event he did not successfully complete treatment, he would be terminated.

To complicate matters, on the evening of September 30, Mr. Cole was involved in a motor vehicle accident, and received injuries. Mr. Cole was placed on sick leave, due to his injuries. As a result of his injuries, Mr. Cole was prescribed painkillers.

While he was still officially on sick leave, Mr. Cole met with the substance abuse evaluator. The evaluator concluded that Mr. Cole needed several weeks of intensive outpatient treatment, which would require Mr. Cole to attend group substance abuse counseling four evenings per week. Mr. Cole was extremely upset with this recommendation and became belligerent with the evaluator. Mr. Cole was further perturbed when he learned that the substance abuse counselor was the husband of the substance abuse evaluator. Mr. Cole attended one substance abuse counseling session. The day after his one and only substance abuse counseling session, Mr. Cole contacted the counselor and advised he would not be returning. The treatment provider notified the school district. On October 15, Ray Rowe, Assistant Director of Operations and Maintenance, Mr. Cole's immediate supervisor, went to Mr. Cole's residence and advised him that he was discharged. Mr. Crary followed up with a formal letter of discharge on October 19.

#### REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in this record establishes that Mr. Cole was discharged for misconduct in connection with his employment. It does not.

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).

Because Mr. Cole was discharged, the school district bears the burden of proving the discharge was for misconduct that would disqualify Mr. Cole from receiving unemployment insurance benefits. See Iowa Code section 96.6(2). The school district has not shown that Mr. Cole's CDL was ever placed in jeopardy as a result of the positive drug screen. Nor has the school district shown that the positive drug screen affected Mr. Cole's ability to carry out his employment duties. The evidence in the record indicates that Mr. Cole had not been asked to drive a school bus in fifteen years. Thus, the provisions of Iowa Code section 321.375, regarding school bus drivers, would not be applicable. Nor has the school district shown that it had any specific policy regarding off-duty conduct that justified discharging Mr. Cole based on the marijuana use and/or failure to complete substance abuse treatment. See Kleidosty v. Employment Appeal Board, 482 N.W.2d 416, 418 (Iowa 1992).

The administrative law judge concludes that the school district has failed to prove that Mr. Cole acted with willful or wanton disregard for the interests of the school district when he provided a positive drug screen for marijuana or when he terminated involuntary substance abuse treatment. No disqualification may enter based on alleged misconduct.

Mr. Cole's testimony raised the issue of whether Mr. Cole has been able and available for work since his discharge from employment on October 19, 2004. This issue will need to be addressed on remand.

DECISION:

The representative's decision dated November 10, 2004, reference 01, is reversed. The claimant is eligible to receive unemployment insurance benefits, provided the claimant meets all other eligibility requirements. The matter is remanded for determination of whether Mr. Cole has been able and available for work since his discharge from employment on October 15, 2004.

jt/b