

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**GARY HALVORSON**  
Claimant

**BRUENING ROCK PRODUCTS INC**  
Employer

**APPEAL 20A-UI-06688-HP-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 03/15/20  
Claimant: Appellant (1)**

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Iowa Code § 96.5(1) – Voluntary Quitting  
Iowa Code § 96.5(2) – Discharge Due to Misconduct

**STATEMENT OF THE CASE:**

Claimant Gary Halvorson filed an appeal from a June 18, 2020 (reference 04) unemployment insurance decision that denied benefits based upon his discharge from employment. Notices of hearing were mailed to the parties' last known addresses of record for a telephone hearing scheduled for July 28, 2020. Halvorson appeared and testified. Benjamin Staley appeared and testified on behalf of the employer, Bruening Rock Products Inc. ("Bruening"). I took administrative notice of the claimant's unemployment insurance benefit records maintained by Iowa Workforce Development.

**ISSUE:**

Was the separation a layoff, discharge for misconduct or voluntary quit without good cause?

**FINDINGS OF FACT:**

Halvorson worked for Bruening as a full-time laborer on a rock quarry production crew on two occasions. His initial hire date was August 23, 2014. Halvorson separated his employment with Bruening and Bruening rehired him on September 21, 2017. Halvorson's immediate supervisor was Jake Halweg.

Bruening has an alcohol and drug policy prohibiting the illegal use, sale, manufacture and distribution of alcohol, drugs, and controlled substances, and possession of drugs and drug paraphernalia in the workplace. The policy is published in the employee handbook. The policy provides employees can be disciplined, up to, and including termination. Halvorson received a copy of the employee handbook and acknowledged he was aware of the policy. Bruening does not have a drug-testing program except for the over-the-road truck drivers who are regulated by the Department of Transportation.

Staley testified on November 13, 2019, Halweg smelled marijuana on Halvorson's person at work. Halvorson drove to work with a neighbor, Jordan Shaller. Shaller told Halweg that Halvorson smoked marijuana on the way to work that day. Halvorson denied smoking marijuana that day.

Halvorson acknowledged Halweg accused him of using marijuana at work, and reported Halweg accused him of using drugs on a daily basis.

Staley testified on November 19, 2019, Halweg caught Halvorson with marijuana and a 3/8 socket on the work site. A 3/8 socket is used to smoke marijuana. Halweg gave Halvorson a verbal warning and the safety director, Tyler Bruening, docketed Halvorson's pay from \$17.25 per hour to \$12.00 per hour due to disciplinary action. Halvorson was driving a dump truck on the worksite. Staley testified Halvorson agreed his pay would be docked. Halvorson denied the incident happened, but recalled being counseled that day and that his pay was reduced. Halvorson admitted he used marijuana while he was employed, but denied using it at work.

On March 6, 2020, Halweg was riding with Halvorson while Halvorson was operating a large dump truck. Staley testified Halweg smelled the odor of marijuana in the truck and asked Halvorson if he had any marijuana in the dump truck. Staley reported Halvorson produced a bag of marijuana and Halweg took the marijuana, dumped it out on the ground and covered it with mud. Halweg gave Halvorson a verbal warning and told him he would have to discuss Halvorson's future with upper management. Halvorson denied this incident happened, but reported Halweg constantly told him he was going to be fired and accused him of being high on drugs every day.

On March 11, 2020, Halvorson's neighbor, Shaller, told Halweg that Halvorson was crushing up methamphetamines and putting it in water to get high at work and that Halvorson was trying to get Shaller to do it with him. Halweg told Halvorson to clean up his dump truck and that his services were no longer required. Halweg discharged Halvorson for multiple instances of drug use and possession of drugs and drug paraphernalia on the job site. Halvorson denied the incident happened and he reported he does not use methamphetamines. Halvorson testified Halweg did not tell him why he was being discharged. Staley reported other employees have been discharged for engaging in similar conduct.

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

Under Iowa Code section 96.5(2)a,

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits: . . .

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 disqualification shall continue 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 Iowa Administrative Code 24.31(1)a, defines the term "misconduct" 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 Iowa Legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 558 (Iowa 1979).

871 Iowa Administrative Code 24.32(4) also 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.

And 871 Iowa Administrative Code 24.32(8) provides:

*Past acts of misconduct.* While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer bears the burden of proving the employee engaged in disqualifying misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6, 11 (Iowa 1982) The issue is not whether the employer made a correct decision in separating the claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262, 264 (Iowa Ct. App. 1984)

Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits; such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806, 808 (Iowa Ct. App. 1984) The definition of misconduct in the administrative rule focuses on deliberate, intentional, or culpable acts by the employee. *Id.* When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* at 808-09. Negligence does not constitute misconduct unless it is recurrent in nature; a single act is not disqualifying unless it is indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731, 735 (Iowa Ct. App. 1986) Additionally, poor work performance is not misconduct in the absence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211, 213 (Iowa Ct. App. 1988). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 666-69 (Iowa 2000) What constitutes misconduct justifying termination of an employee and what misconduct warrants a denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679, 680 (Iowa Ct. App. 1988) Instances of poor judgment are not misconduct. *Richers v. Iowa Dep't of Job Serv.*, 479 N.W.2d 308, 312 (Iowa 1991); *Kelly v. Iowa Dep't of Job Serv.*, 386 N.W.2d 552, 555 (Iowa Ct. App. 1986)

Violation of a specific work rule, even off-duty, can constitute misconduct. In *Kleidosty v. Employment Appeal Board*, 482 N.W.2d 416, 418 (Iowa 1992), the employer had a specific rule prohibiting immoral and illegal conduct. The worker was convicted of selling cocaine off the employer's premises. The court found misconduct. In its analysis, the Court stressed the importance of a specific policy, even one which was stated only in terms of illegal or immoral conduct.

Bruening has an alcohol and drug policy prohibiting the illegal use, sale, manufacture and distribution of alcohol, drugs, and controlled substances, and possession of drugs and drug paraphernalia in the workplace. The policy was published in the employee handbook. Halvorson was aware of the policy.

This case comes down to credibility. I find the testimony of Staley reasonable and consistent with the other evidence I believe. I do not find Halvorson to be a credible witness. During the hearing I assessed the credibility of Staley and Halvorson by considering whether their testimony was reasonable and consistent with other evidence I believe, whether they had made inconsistent statements, their "appearance, conduct, memory and knowledge of the facts," and their interest in the case. *State v. Frake*, 450 N.W.2d 817, 819 (Iowa 1990). Bruening kept contemporaneous records of the incidents and counseling Halvorson received. Halweg warned Halvorson on several occasions not to use drugs or bring drugs or drug paraphernalia to the worksite. Bruening docked Halvorson's pay to try to get him to comply; he did not. The evidence establishes Halvorson used drugs and brought drugs and drug paraphernalia to the workplace on several occasions, contrary to Bruening's policy. Halvorson was operating heavy equipment on the worksite. The use of drugs in the workplace creates risk of serious injury in a mining operation. I find Halvorson's behavior demonstrated willful and wanton disregard for the employer's interest in maintaining a safe, drug-free workplace. Benefits are denied.

## **DECISION:**

### **Regular Unemployment Insurance Benefits Under State Law**

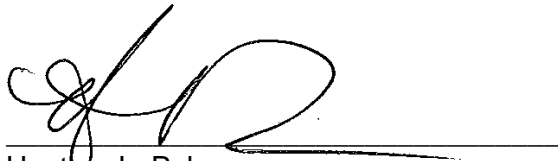
The June 18, 2020 (reference 04) unemployment insurance decision denying unemployment insurance benefits is affirmed. Claimant was discharged for misconduct for a disqualifying reason. Unemployment insurance benefits are denied until the claimant has worked in and earned wages for insured work equal to ten times his weekly benefit amount after his separation date, and provided he is otherwise eligible.

### **Pandemic Unemployment Assistance ("PUA") Under the Federal CARES Act**

Even though the claimant is not eligible for regular unemployment insurance benefits under state law, the claimant may be eligible for federally funded unemployment insurance benefits under the CARES Act. Section 2102 of the CARES Act creates a new temporary federal program called Pandemic Unemployment Assistance ("PUA") that may provide up to 39 weeks of unemployment benefits. An individual receiving PUA benefits may also receive an additional \$600 weekly benefit amount under the Federal Pandemic Unemployment Compensation ("FPUC") program if the individual is eligible for PUA benefits for the week claimed. The FPUC additional \$600 payment per week ends as of July 25th in Iowa. This means the \$600 weekly additional benefit will stop and at this time, no extension or change to the program has been made by Congress at this time. This does mean that you will see a corresponding decrease in your weekly benefit amount. The FPUC payments are not a state benefit and Iowa is unable to make any changes to the availability of this benefit. If a change takes place to this benefit in the future, IWD will share on the IWD website and social media. This decision does not address whether the claimant is eligible for

PUA. If the claimant wishes to receive PUA benefits, the claimant must apply for PUA, as noted in the instructions provided in the "Note to Claimant" below:

**Note to Claimant:** If this decision determines you are not eligible for regular unemployment insurance benefits and 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. Individuals who do not qualify for regular unemployment insurance benefits, but who are currently unemployed for reasons related to COVID-19 may qualify for Pandemic Unemployment Assistance ("PUA"). **You will need to apply for PUA to determine your eligibility under the program. Additional information on how to apply for PUA can be found at <https://www.iowaworkforcedevelopment.gov/pua-information>.** This decision denies benefits. If this decision becomes final or if you are not eligible for PUA, you may have an overpayment of benefits.



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August 4, 2020  
Decision Dated and Mailed

hlp/scn