

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

HENRY G BROWN
Claimant

BLATTNER ENERGY INC
Employer

APPEAL 21A-UI-24113-ED-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 09/12/21
Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer/appellant filed an appeal from the October 22, 2021 (reference 01) unemployment insurance decision that allowed benefits based upon claimant's separation from employment. The parties were properly notified of the hearing. A telephone hearing was held on December 27, 2021. The claimant, Henry Brown, participated personally. The employer, Blattner Energy Inc., participated through witness Karen Ellifson. No exhibits were offered or admitted. The administrative law judge took administrative notice of the claimant's unemployment insurance benefits records.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Did claimant voluntarily quit the employment with good cause attributable to employer?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time beginning September 9, 2019 until July 27, 2021 when he was discharged from employment. Claimant's position was foreman. Claimant's job duties included construction duties and supervising his crew.

The employer does have a written drug policy. The claimant was made aware of the policy. The claimant came up on a random drug test on. This drug test was administered by an independent third party. The policy states: "I understand that in accordance with company policy, I may be required to submit to a drug screen for pre-employment purposes, probable cause, random and for all work-related accidents. A refusal to consent to a drug screen as well

as any positive drug screen will result in termination.” The claimant did not receive a copy of this policy but signed an acknowledgement that he had read the policy.

The claimant was first tested on March 12, 2020. The March 12, 2020 test was positive for methamphetamines. The claimant was suspended and went through the employee assistance program. Claimant was also informed that a second positive would result in immediate termination. The second test was July 20, 2021. Both tests were random selection.

The second test result was also positive for methamphetamines. The medical review officer informed the employer of that the test was positive. Claimant was called into the office and terminated in person. The claimant was also sent a letter via certified mail showing the drug test results. This test was an oral fluid test.

The employer used Med-Tox laboratories to administer its tests.

The employer does have an awareness program regarding the dangers of drug and alcohol use in the workplace. The employer does have an employee assistance program with notice posted regarding the program or a resource file of certified alcohol and other drug abuse programs that informs the employees about the resource file and a summary of the information contained in the resource file. The employer does require supervisory personnel who are involved in alcohol or drug testing to attend a minimum of two hours of initial training and a minimum of one hour of subsequent training each year to inform them about the signs of drug and alcohol abuse.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for a disqualifying reason. Benefits are allowed.

As a preliminary matter, I find that Claimant did not quit. Claimant was discharged from employment.

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) 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.

Iowa Admin. Code r.871-24.32(8) provides:

(8) 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 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). 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. 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).

What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. 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.

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 (Iowa Ct. App. 1984). The focus of the administrative code definition of misconduct is 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.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986).

When an employee is discharged due to their failure to pass or refusal to submit to drug testing, the employer must comply with Iowa Code § 730.5. If an employer chooses to conduct alcohol or drug testing, it must substantially comply with all the strict requirements of this statute. If an employer has an alcohol or drug testing policy, it must be in writing. Iowa Code § 730.5(9)(a)(1). The policy must have been provided to every employee subject to testing and must be available for review by employees and prospective employees. Iowa Code § 730.5(9)(a)(1).

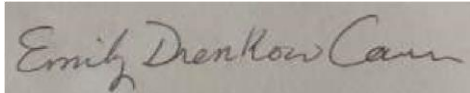
Employers shall establish an awareness program to inform employees of the dangers of drug and alcohol use in the workplace and comply with the following requirements in order to conduct drug or alcohol testing under this section: (1) If an employer has an employee assistance program, the employer must inform the employee of the benefits and services of the employee assistance program. An employer shall post notice of the employee assistance program in conspicuous places and explore alternative routine and reinforcing means of publicizing such services. In addition, the employer must provide the employee with notice of the policies and procedures regarding access to and utilization of the program. (2) If an employer does not have an employee assistance program, the employer must maintain a resource file of alcohol or other drug abuse programs certified by the Iowa department of public health, mental health providers, or other persons, entities, or organizations available to assist employees with personal or behavioral problems. The employer shall provide all employees information about the existence of the resource file and a summary of the information contained within the resource file. The summary should contain, but need not be limited to, all information necessary to access the services listed in the resource file. Iowa Code § 730.5(9)(c). Further, in order to conduct drug or alcohol testing under this section, an employer shall require supervisory personnel of the employer involved with drug or alcohol testing under this section to attend a minimum of two hours of initial training and to attend, on an annual basis thereafter, a minimum of one hour of subsequent training. Iowa Code § 730.5(9)(h).

The employer provided a copy of the written policy to the claimant. The employer established an employee assistance program or maintain a resource file of abuse programs. The employer does not provide any training for supervisory personnel involved in administering the drug policy. It is clear that the employer did not substantially comply with Iowa Code § 730.5. *Sims v. NCI Holding Corp.*, 759 N.W.2d 333 (Iowa 2009). "Substantial compliance is said to be compliance in respect to essential matters necessary to assure the reasonable objectives of the statute." *Sims*, 759 N.W.2d at 338. Arguably, the most important aspect of the policy would be communication to the employee that it exists and what the policy in fact requires. Iowa Code § 730.5(9)(a)(1) provides that the policy *must* have been provided to every employee subject to testing *and* must be available for review by employees and prospective employees. (emphasis added). While a copy of the policy may have been available for claimant to review, Ms. Garrett credibly testified that a copy was never given to the claimant. Further, no employee assistance program or resource file exists at this employer and no supervisory personnel training was completed. This is not substantial compliance with the statute.

As such, employer has proven that it has substantially complied with Iowa Code § 730.5 and the employer has proven a current act of job-related misconduct that would lead to the denial of unemployment insurance benefits to the claimant. As such, benefits are denied.

DECISION:

The October 22, 2021 (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for disqualifying reason. Benefits are denied.



Emily Drenkow Carr
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January 24, 2022
Decision Dated and Mailed

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