

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHARLEEN G ROSELLI

Claimant

APPEAL NO. 13A-UI-12084-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

STAPLES CONTRACT AND COMMERICAL

Employer

OC: 09/29/13

Claimant: Respondent (2R)

Section 96.5-2-a – Discharge for Misconduct

Section 96.3-7 – Overpayment of Benefit

STATEMENT OF THE CASE:

The employer filed an appeal from a representative's decision dated October 17, 2013, reference 01, which held that the claimant was eligible for unemployment insurance benefits. After due notice, a hearing was held on November 20, 2013. The claimant failed to respond to the hearing notice and did not participate. A copy of the C2T hearing control screen is enclosed with the file to show that the claimant did not call in for the hearing. The employer participated by Matt Gaul, the human resources manager; Eunice Koopmans, the distribution manager; and Brad Helmricks, the supervisor. The record consists of the testimony of Matt Gaul; the testimony of Brad Helmricks; and Employer's Exhibits 1-3.

ISSUE:

Whether the claimant was discharged for misconduct; and

Whether the claimant has been overpaid unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer handles promotional goods. The company employs more than 50 employees. The claimant was hired on October 3, 2012. She was a full-time picker and packer. Her last day of work was September 30, 2013. She was terminated on September 30, 2013.

The claimant was terminated because she reported to work under the influence of alcohol on September 30, 2013. An employee reported to Brad Helmricks that the claimant smelled of alcohol. Mr. Helmricks is certified to determine if there is reasonable suspicion that an employee is under the influence of alcohol. The claimant was taken to the hospital where a breathalyzer test was administered twice. Her first reading was .0793 and the second reading was .088. A medical review officer discussed the results with the claimant and the employer was then informed. The claimant was taken back to the workplace, where a meeting was held

with the claimant. She was offered the services of the employer's employee assistance program, which includes alcohol rehabilitation services. The claimant declined.

The employer has a written policy that prohibits employees from reporting for work and being under the influence of alcohol or drugs. The claimant was aware of that policy.

REASONING AND CONCLUSIONS OF LAW:

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.

Iowa Code section 730.5 provides the authority under which a private sector employer doing business in Iowa may conduct drug or alcohol testing of employees. In Eaton v. Employment Appeal Board, 602 N.W.2d 553 (Iowa 1999), the Supreme Court of Iowa considered the statute and held "that an illegal drug test cannot provide a basis to render an employee ineligible for unemployment compensation benefits." Thereafter, in Harrison v. Employment Appeal Board, 659 N.W.2d 581 (Iowa 2003), the Iowa Supreme Court held that where an employer had not complied with the statutory requirements for the drug test, the test could not serve as a basis for disqualifying a claimant for benefits. In Sims v. NCI Holding Corp., 759 N.W. 2d 333, 338 (Iowa 2009), the court held that substantial compliance with the statute was required before a drug test request or drug test may serve as a basis for disqualifying an employee for unemployment insurance benefits.

The evidence in this case established that the employer complied with the provisions of Iowa Code section 730.5(8) and could require the claimant to take a test to determine if she was under the influence of alcohol. The claimant tested positive for alcohol and the levels were above those permitted in the workplace. The employer has a zero tolerance for reporting for work under the influence of alcohol. The claimant violated the employer's policy on the alcohol use. She declined the services of the employer's employee assistance program. The employer has shown misconduct. Benefits are denied.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code section 96.3-7-a, b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits. There is nothing in the file to indicate that the fact finding documents were provided to the parties prior to the hearing. This case is remanded to the Claims Section for determination of the amount of the overpayment; whether the claimant is required to repay the benefits; and whether the employer participated in fact finding.

DECISION:

The decision of the representative dated October 17, 2013, reference 01, is reversed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefits amount, provided claimant is otherwise eligible. The overpayment issue is remanded to the Claims Section for determination.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css