

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**ROBERT D SMITH**  
Claimant

**CENTRAL BODY COMPANY**  
Employer

**APPEAL 17A-UI-05066-NM-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 04/09/17  
Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct  
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 filed an appeal from the May 4, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on May 30, 2017. The claimant did not participate. The employer participated through President Matt Sain, General Manager Bill Tamisiea, and Technician Dan Beam. Official notice was taken of the administrative record.

**ISSUES:**

Was the claimant discharged for disqualifying job-related misconduct?

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 as a technician from April 18, 2016, until this employment ended on March 31, 2017, when he was discharged.

On March 29, 2017, Tamisiea received a call from Beam indicating that claimant was intoxicated while at work and he did not feel safe working with him. Beam testified he observed claimant smoking marijuana on work property that day and also believed him to be intoxicated by alcohol based on the smell of his breath, slurring of his words, and other general behavior. When Beam called Tamisiea, claimant then got on the phone and accused Beam of also being intoxicated.

The employer has a policy in place which prohibits the use of drugs or alcohol in the workplace. The employer also has a policy in place which states that employees may be subject to testing upon reasonable suspicion of intoxication. Claimant received a copy of this policy upon his hire

on April 18, 2016 and signed an acknowledgement of receipt. The policy provides that a refusal to take the test or positive result will result in termination.

Based on the reports he received, Tamisiea instructed both claimant and Beam to report for testing. Beam complied and it was concluded his test results were negative. Claimant initially agreed, but then indicated he would be unable to report for testing. Tamisiea offered to drive claimant to the testing center, but he declined this offer. Claimant then called in sick to work the next two days. Sain then made the decision to terminate claimant's employment based on the information provided to the employer by Beam on March 29.

The claimant filed a new claim for unemployment insurance benefits with an effective date of April 9, 2017. The claimant has not received any unemployment insurance benefits to date. The employer did not participate in a fact finding interview regarding the separation on May 3, 2017. The fact finder determined claimant qualified for benefits.

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

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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 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). 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). The Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

The claimant was observed to be using marijuana on company property by a coworker. The same coworker also believed claimant to be under the influence of alcohol based on the smell of his breath, slurred speech, and his general behavior. Iowa law allows drug testing of an employee if, among other conditions, the employer has "probable cause to believe that an employee's faculties are impaired on the job." Iowa Code § 730.5. It also provides that employees who refuse to provide a testing sample may be disciplined and that such discipline may include termination. Iowa Code § 730.5(10)(a)(3). Here, claimant refused testing and that refusal would likely be disqualifying misconduct. However, the employer testified claimant was discharged after it concluded he was using marijuana on work premises and intoxicated by alcohol while at work. Credible testimony was provided by Beam supporting this conclusion. Beam testified he personally observed claimant using marijuana at work and observed him to otherwise be intoxicated by alcohol as well. The claimant's possession and consumption of drugs and alcohol on the employer's property was in violation of the employer's known policies and in violation of the employer's best interest. His actions are misconduct even without prior warning. As claimant has not received any unemployment insurance benefits to date, the issues of overpayment and participation are moot.

#### **DECISION:**

The May 4, 2017, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

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Nicole Merrill  
Administrative Law Judge

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Decision Dated and Mailed

nm/rvs