

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

HAROLD J SPEAR
Claimant

WHIRLPOOL CORPORATION
Employer

APPEAL 20A-UI-13557-CL-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 11/24/19
Claimant: Appellant (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.6(2) - Timeliness of Appeal

STATEMENT OF THE CASE:

On October 31, 2020, the claimant filed an appeal from the April 1, 2020, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on January 19, 2021. Claimant participated. Employer participated through senior human resource specialist Amih Sallah.

ISSUES:

Is the appeal timely?
Is the claimant disqualified from receiving unemployment insurance benefits during his disciplinary suspension?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: On April 1, 2020, Iowa Workforce Development (IWD) mailed a decision to claimant's last address of record that denied unemployment insurance benefits. The decision warned that an appeal must be filed by April 11, 2020. Claimant did not receive the decision. Claimant stopped receiving unemployment insurance, so he contacted Iowa Workforce Development. Claimant was told employer had protested his claim and he would receive more information in the mail. Claimant did not receive more information until the October 22, 2020, decision finding him overpaid benefits. Claimant timely appealed the overpayment decision.

Claimant began working for employer on July 19, 2010. Claimant last worked as a full-time assembler.

Employer has a drug and alcohol policy. The policy states that being under the influence of drugs or alcohol is not permitted at work and that an employee can be tested for drugs and alcohol after being involved in an accident or based upon reasonable suspicion. Claimant was aware of the policy.

On February 21, 2020, employer notified claimant that his co-worker alleged he almost hit him while driving a forklift. Claimant denied the allegation and there were no surveillance cameras or other witnesses to the incident. Claimant asked to speak with his accuser. Employer denied that request and informed claimant he would be required to take a drug and alcohol test or be terminated from employment. Employer sent claimant to give a urine sample to a company nurse. The test initially came back positive for marijuana and it was sent to a laboratory for confirmation.

On March 3, 2020, employer sent a letter to claimant by certified mail notifying him that his urine sample tested positive for marijuana and giving him the opportunity to have a split sample of his urine tested. Claimant did not request that the split sample be tested.

Employer referred claimant to a six-week, out-patient drug treatment program. Employer informed claimant that he would not be permitted to return to work until he completed the program.

Claimant completed the program. On May 26, 2020, claimant returned to work. Claimant left work at 9:09 a.m. and applied for a leave of absence. The leave was not approved. Claimant did not return to work, which ultimately led to his termination on July 9, 2020. The Benefits Bureau of Iowa Workforce Development has not issued an initial decision on whether the events that happened after May 26, 2020, make claimant ineligible and/or disqualify claimant for regular unemployment insurance benefits.

REASONING AND CONCLUSIONS OF LAW:

The first issue to be considered in this appeal is whether the appellant's appeal is timely. The administrative law judge determines it is.

Iowa Code § 96.6(2) provides, in pertinent part:

The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. . . . Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision.

The claimant did not have an opportunity to timely appeal the fact-finder's decision because the decision was not received. Without notice of a disqualification, no meaningful opportunity for appeal exists. See *Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973). The claimant timely appealed the overpayment decision, which was the first notice of disqualification.

The next issue is whether claimant was suspended for misconduct.

Iowa Code § 96.5(2)a provides:

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 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.

The employer has the burden to prove the claimant was discharged for job-related misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer made the correct decision in ending claimant's employment, 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). Misconduct justifying termination of an employee and misconduct warranting denial of unemployment insurance benefits are two different things. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

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). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence is not 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). 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).

Iowa Admin. Code r. 871-24.32(9) provides:

(9) Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification. This rule is intended to implement Iowa Code

section 96.5 and Supreme Court of Iowa decision, Sheryl A. Cospers vs. Iowa Department of Job Service and Blue Cross of Iowa.

Here, the employer based its decision to suspend claimant on a drug test that was positive for marijuana. So the next issue is whether drug test was conducted in accordance with Iowa law.

Testing under Iowa Code section 730.5(4) allows employers to test employees for drugs and/or alcohol but requires the employer “adhere to the requirements . . . concerning the conduct of such testing and the use and disposition of the results.”

Iowa Code section 730.5(1)*i* allows drug testing of an employee upon “reasonable suspicion” that an employee’s faculties are impaired on the job or on an unannounced random basis. Reasonable suspicion may be based on “a significant deterioration in work performance.”

In this case, employer suspended claimant based on a report that he almost hit an employee while driving a forklift. Although claimant denied engaging in the conduct, employer would have been derelict in its duty to maintain a safe workplace had it NOT required claimant to take a drug test in this situation.

Employer complied with the other requirements of Iowa Code section 730.5.

Employer established claimant was suspended for a reason that amounts to misconduct.

DECISION:

The April 1, 2020, (reference 01) unemployment insurance decision is affirmed. The appeal is timely. Claimant was suspended from employment for misconduct. Benefits are withheld until such time as claimant works in and has been paid wages equal to ten times his weekly benefit amount, provided he is otherwise eligible.



Christine A. Louis
Administrative Law Judge
Unemployment Insurance Appeals Bureau
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax (515)478-3528

February 4, 2021
Decision Dated and Mailed

cal/mh

Note to Claimant: This decision determines you are not eligible for regular unemployment insurance benefits. If 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 due to disqualifying separations, 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>.