

**IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU**

MONICA SIMS
Claimant

CATHOLIC HEALTH INITIATIVES
Employer

APPEAL 23A-UI-05664-DB-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 04/30/23
Claimant: Respondent (1R)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Overpayment of Benefits
Iowa Admin. Code r. 871-24.10 – Employer Participation in Fact finding Interview

STATEMENT OF THE CASE:

The employer/appellant filed an appeal from the May 22, 2023 (reference 01) unemployment insurance decision that allowed unemployment insurance benefits to the claimant based upon a discharge from work. The parties were properly notified of the hearing. A telephone hearing was held on June 21, 2023. The claimant participated personally. The employer participated through witness Doreen Richmond and was represented by Mackenzie Crist. Employer's Exhibit 1 was admitted. The administrative law judge took administrative notice of the claimant's unemployment insurance benefits records.

ISSUES:

Was the claimant's separation from employment disqualifying?
Was the claimant overpaid benefits?
Can any overpayment of benefits be waived and is the employer's account chargeable?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began her employment on September 9, 2016 as a Food Service Associate. She worked full-time day shift hours. Claimant's last day physically worked on the job was March 23, 2023 and she was discharged from employment on March 30, 2023.

On March 23, 2023, it was reported to the claimant's supervisor, Wunda Hensley, that the claimant smelled like marijuana. Ms. Hensley called the claimant into her office and she also believed that the claimant smelled like marijuana. Claimant was escorted to the medical facility to have a drug test completed. When she arrived at the medical facility, she was interviewed by two nurses. Claimant was told by both nurses that administered the drug test that she did not smell like marijuana. Claimant was asked by the nurses who administered her drug test whether a co-worker disliked her and that was the reason she was being drug tested. Claimant was not acting impaired in any way. Claimant was not under the influence of illegal substances on March 23, 2023. Her urine was collected and she was told she could not work until the results were received back.

On March 30, 2023, the employer mailed the claimant a letter stating that the drug test was positive for illegal substances. See Exhibit 1. Claimant was discharged due to the drug test. See Exhibit 1.

The employer has a written policy against use of drugs and being under the influence of illegal drugs at work. The claimant may have received a copy of the policy; however, no acknowledgement form was provided by the employer. A copy of the drug policy was not provided by the employer. The employer's drug policy purports to state that the employer has the right to test employees based upon the employer's reasonable suspicion that an employee is under the influence of illegal substances; however, a copy of the policy was not provided. It is unknown whether a split sample of the claimant's urine was actually collected. Claimant was never mailed a letter notifying her of the test results and notifying her that she had the right to test any split sample that may have been collected. A copy of the drug test was not provided by the employer; however, Ms. Richmond testified that the claimant tested positive for THC.

Claimant's administrative records establish that the claimant has received \$2,280.00 in unemployment insurance benefits for the weeks between April 30, 2023 and May 27, 2023. The claimant's claim for benefits is currently locked due to a decision that was issued by Iowa Workforce Development on June 2, 2023 (reference 02). The employer did not participate by telephone in the fact-finding interview that Iowa Workforce Development conducted on May 18, 2023 and did not provide sufficient written documentation that included the claimant's test results or letter notifying her of the test results and her right to have a second test completed.

The issue of whether the June 2, 2023 (reference 02) decision regarding **this same separation** from employment was issued by the agency in error and should be determined void is remanded to the Benefits Bureau for an initial investigation and determination.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes as follows:

Iowa Code section 96.5(2)a & d(5) provide in pertinent part:

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.

d. For the purposes of this subsection, "misconduct" means a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of the 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

obligation to the employer. Misconduct by an individual includes but is not limited to all of the following: ...

(5) Reporting to work under the influence of alcohol, illegal or nonprescribed prescription drugs, or an impairing substance in an off-label manner, or a combination of such substances, on the employer's premises in violation of the employer's employment policies, unless the individual is compelled to work by the employer outside of scheduled or on-call working hours.

The employer has the burden of proof in establishing disqualifying job-related misconduct.¹ In unemployment insurance benefits cases, the issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits.² What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions.³ Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits.⁴ Such misconduct must be "substantial."⁵

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.

The claimant was discharged for the sole reason of testing positive for illegal substances on a drug test administered by the employer due to a reasonable suspicion basis. Iowa Code section 730.5 governs private sector drug-free workplaces. It provides that "[c]ollection of a sample for testing of current employees shall be performed so that the sample is split into two components at the time of collection in the presence of the individual from whom the sample is collected".⁶ Further, "[i]f the sample is urine, the sample shall be split such that the primary sample contains at least thirty milliliters and the secondary samples contains at least fifteen milliliters. Both portions of the sample shall be forwarded to the laboratory conducting the initial confirmatory testing."⁷ In this case, no second sample was collected for any further testing.

The statute goes on to state, "If a confirmed positive test result for drugs or alcohol for a current employee is reported to the employer by the medical review officer, the employer shall notify the employee in writing by certified mail, return receipt requested, of the results of the test, the employee's right to request and obtain a confirmatory test of the second sample collected pursuant to paragraph "b" at an approved laboratory of the employee's choice, and the fee payable by the employee to the employer for reimbursement of expenses concerning the test."⁸

¹ *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

² *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984).

³ *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

⁴ *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

⁵ *Id.*

⁶ Iowa Code section 730.5(7)b.

⁷ *Id.*

⁸ Iowa Code section 730.5(7)j(1).

None of that was done in this case. The claimant never received a copy of her test results in the mail or any notification that she could have any split sample tested or how to obtain that testing.

The Iowa Supreme Court has held that an employer may not “benefit from an unauthorized drug test by relying on it as a basis to disqualify an employee from unemployment compensation benefits.”⁹ While the employer certainly may have been within its rights to test and discharge the claimant, it failed to collect a split sample of her urine, it failed to notify her in writing of what her test results consisted of, and it failed to notify her of her opportunity for a second split sample test according to the requirements of Iowa Code § 730.5. Because it failed to substantially comply with the statute, the employer cannot use the results of the drug screen as a basis for disqualification from benefits. The separation from employment with this employer is not disqualifying and benefits are allowed, provided claimant is otherwise eligible.

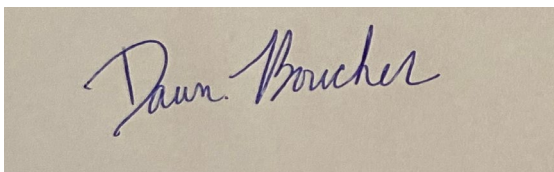
The issue of overpayment is moot as the claimant’s separation from employment with this employer is not disqualifying. The employer did not sufficiently participate in the initial fact-finding interview and its account may be charged for benefits paid.

DECISION:

The May 22, 2023 (reference 01) unemployment insurance decision that found the claimant’s separation from employment with this employer was not disqualifying is affirmed and remains in effect. Claimant was discharged from employment for no disqualifying reason. No overpayment of benefits was established due to this separation from employment. Benefits are allowed, provided the claimant remains otherwise eligible. This employer’s account may be charged for benefits paid.

REMAND:

The issue of whether the June 2, 2023 (reference 02) decision regarding **this same separation** from employment was issued by the agency in error and should be **determined void** so that claimant’s claim may be unlocked and she may resume weekly-continued claim filings is remanded to the Benefits Bureau for an initial investigation and determination.



Dawn Boucher
Administrative Law Judge

June 26, 2023
Decision Dated and Mailed

db/scn

⁹ *Eaton v. Iowa Emp’t Appeal Bd.*, 602 N.W.2d 553, 557, 558 (Iowa 1999).

APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
Online: eab.iowa.gov**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. *There is no filing fee to file an appeal with the Employment Appeal Board.*

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:

- 1) The name, address, and social security number of the claimant.
- 2) A reference to the decision from which the appeal is taken.
- 3) That an appeal from such decision is being made and such appeal is signed.
- 4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may file a petition for judicial review in district court.

2. If you do not file an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at www.iowacourts.gov/efile. *There may be a filing fee to file the petition in District Court.*

Note to Parties: YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
En línea: eab.iowa.gov**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal. *No hay tarifa de presentación para presentar una apelación ante la Junta de Apelación de Empleo.*

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si no presenta una apelación de la decisión del juez ante la Junta de Apelación de Empleo dentro de los quince (15) días, la decisión se convierte en una acción final de la agencia y tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días. Puede encontrar información adicional sobre cómo presentar una petición en www.iowacourts.gov/efile. *Puede haber una tarifa de presentación para presentar la petición en el Tribunal de Distrito.*

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.