

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ANTHONY D SINGLETON
Claimant

APPEAL NO: 14A-UI-05770-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

WINEGARD COMPANY
Employer

**OC: 05/11/14
Claimant: Respondent (2)**

Section 96.5-2-a – Discharge
871 IAC 24.32(1) – Definition of Misconduct
Section 96.3-7A,B – Recovery of Overpayment
871 IAC 24.10 – Employer Fact Finding Participation

STATEMENT OF THE CASE:

The employer appealed a department decision dated May 30, 2014 (reference 01) that held the claimant was not discharged for misconduct on April 25, 2014 and benefits are allowed. A telephone hearing was held on June 26, 2014. The claimant participated. Kerry Hale, HR Manager, participated for the employer. Employer Exhibit One was received as evidence.

ISSUES:

Whether claimant was discharged for misconduct in connection with employment.

Whether claimant is overpaid unemployment benefits.

Whether employer participated in department fact finding.

FINDINGS OF FACT:

The administrative law judge having heard the witness testimony and having considered the evidence in the record, finds: The claimant was hired on September 17, 2012 and last worked for the employer as a full-time press operator on April 17, 2014. He received the employer drug/alcohol testing policy on February 20, 2014. It allows the employer to request an employee to submit to reasonable suspicion testing for the use of alcohol or illegal drugs.

Claimant submitted to a reasonable suspicion test based on observations on April 11, 2014. He tested positive for alcohol and illegal drugs (cocaine). He was notified by an MRO/medical review authority of the positive test and suspended by the employer on April 17.

The employer sent claimant a certified letter dated April 17 regarding the positive test results and suspension. He was given the option to have a split urine sample retested at his expense. He declined.

Claimant elected to participate in an employer offered EAP program. Claimant failed to report to a scheduled counselor appointment on April 24 without a satisfactory excuse. He had been notified a failure to complete the program would result in employment termination. While the employer excused claimant from reporting to work the morning of April 24, it did not excuse him from the counselor appointment. The employer notified claimant by an April 25 letter he was terminated.

Claimant has received an offset credit totaling \$2,448.00 of unemployment benefits to apply as a credit against a prior overpayment. Claimant committed no act of fraud or misrepresentation to obtain unemployment benefits. HR Manager Hale participated at department fact finding.

REASONING AND CONCLUSIONS OF LAW:

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).

The administrative law judge concludes employer has established claimant was discharged for misconduct in connection with employment on April 25, 2014 for violation of the employer drug and alcohol testing policy as it relates to the EAP regarding continuing employment.

The claimant knew that participation in the EAP program was a condition of continuing employment. The failure to attend the April 24 counselor appointment without an excusable reason is a violation that constitutes job-disqualifying misconduct.

Iowa Code § 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

The administrative law judge further concludes claimant is not entitled to the offset credit totaling \$2,448.00 benefits to apply against a prior overpayment.

The department record shows claimant has a prior benefit overpayment and his weekly benefits totaling \$2,448.00 over the six week period ending June 21, 2014 was applied as an offset to repay the overpayment. Although claimant committed no act of fraud or misrepresentation to obtain the offset benefit credit, the disqualification in this matter coupled with employer participation at fact finding denies this credit action.

DECISION:

The department decision dated May 30, 2014 (reference 01) is reversed. The claimant was discharged for misconduct on April 25, 2014. Benefits are denied until the claimant requalifies by working in and being paid wages for insured work equal to ten times his weekly benefit amount, provided the claimant is otherwise eligible. Claimant is denied the offset credit of \$2,448.00 against his prior outstanding overpayment.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

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