

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**RON E MARKLEY**  
Claimant

**APPEAL NO. 10A-UI-03983-S2T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**VALERO SERVICES INC**  
Employer

**OC: 01/31/10**  
**Claimant: Respondent (2/R)**

Section 96.5-2-a – Discharge for Misconduct  
Section 96.3-7 – Overpayment

**STATEMENT OF THE CASE:**

Valero Services (employer) appealed a representative's March 10, 2010 decision (reference 01) that concluded Ron Markley (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for May 26, 2010. The claimant participated personally. The employer participated by Robert Abbott, Senior Manager of Human Resources; Monica Gonzalez, Lead Human Resource Specialist; and Barry Sachs, Medical Review Officer for Disa.

**ISSUE:**

The issue is whether the claimant was separated from employment for any disqualifying reason.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on July 18, 2005, as a full-time maintenance technician. The claimant signed for receipt of the employer's handbook on March 25, 2009. The handbook contained the employer's written drug and alcohol policy. He was using Listerine mouthwash with a Waterpik and Listerine spray according to his dentist's instructions.

On February 3, 2010, the claimant used his Listerine with a Waterpik at home before coming to work. He arrived at work at approximately 7:00 a.m. He used the spray at work. At approximately 7:45 a.m. his supervisor suspected alcohol consumption because the claimant smelled of alcohol. The claimant knew that he would be tested. He may have used the spray again. Shortly after 7:45 a.m.

The claimant submitted to a reasonable suspicion breath test at 10:48 a.m. and registered a 0.130. At 11:04 a.m. the claimant tested at 0.123. The claimant tested higher than the 0.02 percent the employer allowed. The claimant was handed a copy of the results by the laboratory. Later that day the employer terminated the claimant for violation of the employer's drug and alcohol policy.

## REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was discharged for 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.

The employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant was terminated for violating the employer's drug and alcohol policy. The claimant knew that any positive results on a reasonable suspicion alcohol test would result in termination. The employer is entitled to perform reasonable suspicion alcohol testing and to discharge upon the receipt of a positive result. The claimant failed to present any substantive evidence of a reason for a false positive. Expert testimony was offered regarding whether a particular substance would cause a false positive. The claimant was discharged for misconduct in connection with his work. He is not qualified to receive unemployment insurance benefits.

Iowa Code section 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 claimant has received benefits since filing the claim herein. Pursuant to this decision, those benefits may now constitute an overpayment. The issue of the overpayment is remanded for determination.

**DECISION:**

The representative's March 10, 2010 decision (reference 01) is reversed. The claimant is not eligible to receive unemployment insurance benefits because the claimant was discharged from

work for misconduct. Benefits are withheld until the claimant has worked in and has been paid wages for insured work equal to ten times the claimant's weekly benefit amount, provided the claimant is otherwise eligible. The issue of the overpayment is remanded for determination.

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Beth A. Scheetz  
Administrative Law Judge

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Decision Dated and Mailed

bas/pjs