

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

BROOKLYN CLARK
Claimant

PRESTAGE FOODS OF IOWA LLC
Employer

APPEAL 20A-UI-06344-HP-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 05/03/20
Claimant: Appellant (1)

Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.5(2) – Discharge Due to Misconduct

STATEMENT OF THE CASE:

Claimant Brooklyn Clark filed an appeal from a June 9, 2020 (reference 01) unemployment insurance decision that denied benefits based upon her discharge from employment. Notices of hearing were mailed to the parties' last known addresses of record for a telephone hearing scheduled for July 21, 2020. Clark appeared and testified. Beau Berge testified on Clark's behalf. Pamela Webster appeared and testified on behalf of the employer, Prestage of Iowa LLC ("Prestage"). I took administrative notice of the claimant's unemployment insurance benefits records maintained by Iowa Workforce Development.

ISSUE:

Was the separation a layoff, discharge for misconduct or voluntary quit without good cause?

FINDINGS OF FACT:

Clark commenced full-time employment with Prestage on January 13, 2020. Clark worked with a sharp wizzard or curved knife while processing meat at work.

Clark started work on April 2, 2020, at 6:00 a.m. Between 11:00 a.m. and 11:20, a.m., Clark's supervisor, Fred Ross and Sarah Adams, a human resources manager, observed Clark. Ross and Adams observed Clark's speech was slowed and slurred and that Clark smelled of an alcoholic beverage. Ross and Adams notified Clark they suspected she was under the influence of alcohol and requested testing. Webster testified Clark admitted using alcohol the night before, but reported she stopped drinking at 8:00 p.m. At hearing Clark denied she admitted using alcohol. Her witness, Berge, also denied she had been drinking.

Prestage has a written drug and alcohol policy. The policy prohibits employees from being under the influence of alcohol while performing work duties. The policy states that if reasonable suspicion exists that an employee is in violation of the policy, the employer can remove the employee from the premises, conduct testing in accordance with applicable law, and administer corrective action. The policy states that employees who test positive for alcohol impairment or intoxication are subject to immediate termination. The policy deems an employee to test positive for alcohol if a test result exceeds .04. Clark received a copy of the policy.

Adams escorted Clark to the clinic on site. Kate M. Roberts, a registered nurse with UnityPoint at Work staffed the clinic on site at the plant. At the clinic, Roberts gave Clark a breathalyzer test at 11:33 a.m. The test found Clark's Blood Alcohol Concentration ("BAC") was .292. At 11:50 a.m., Roberts administered the test again. At this time, Clark's BAC was .254. Clark signed the alcohol testing form, acknowledging she tested positive for alcohol as noted.

Prestage terminated Clark's employment. Webster testified Clark worked with a curved wizard knife and Prestage has a zero tolerance policy because employees under the influence of drugs or alcohol and because the presence of alcohol or drugs in an employee's system increases the risk the employee will injure himself or herself, or another employee. Clark was never previously disciplined for similar conduct. Clark called Berge for a ride home.

At hearing Clark denied using alcohol. She testified she was sick and she had drunk NyQuil and used menthol cough drops. Berge testified Clark did not drink alcohol the night before. Webster testified she spoke with the Director of Clinical Operations for UnityPoint at Work regarding the possibility of a false reading with the tests and the Director reported it was not possible that cough drops would create a false positive test with the second reading fifteen or more minutes later.

REASONING AND CONCLUSIONS OF LAW:

Under Iowa Code section 96.5(2)a,

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.

871 Iowa Administrative Code 24.31(1)a, defines the term "misconduct" 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 Iowa Legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 558 (Iowa 1979).

871 Iowa Administrative Code 24.32(4) also provides,

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.

And 871 Iowa Administrative Code 24.32(8) provides:

Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer bears the burden of proving the employee engaged in disqualifying misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6, 11 (Iowa 1982) The issue is not whether the employer made a correct decision in separating the claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262, 264 (Iowa Ct. App. 1984)

Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits; such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806, 808 (Iowa Ct. App. 1984) The definition of misconduct in the administrative rule focuses on deliberate, intentional, or culpable acts by the employee. *Id.* When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* at 808-09. Negligence does not constitute misconduct unless it is recurrent in nature; a single act is not disqualifying unless it is indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731, 735 (Iowa Ct. App. 1986) Additionally, poor work performance is not misconduct in the absence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211, 213 (Iowa Ct. App. 1988). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 666-69 (Iowa 2000) What constitutes misconduct justifying termination of an employee and what misconduct warrants a denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679, 680 (Iowa Ct. App. 1988) Instances of poor judgment are not misconduct. *Richers v. Iowa Dep't of Job Serv.*, 479 N.W.2d 308, 312 (Iowa 1991); *Kelly v. Iowa Dep't of Job Serv.*, 386 N.W.2d 552, 555 (Iowa Ct. App. 1986)

Iowa Code section 730.5 governs drug and alcohol testing in private sector employment. The Iowa Supreme Court has held 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." *Eaton v. Iowa Emp't Appeal Bd.*, 602 N.W.2d 553, 557-58 (Iowa 1999)

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

Iowa Code section 730.5(9) requires that a written drug screen policy be provided to every employee subject to testing. Iowa Code section 703.5(1)(i) allows drug testing of an employee upon "reasonable suspicion" that an employee's faculties are impaired on the job. Testing shall include confirmation of initial positive test results. For breathalyzer testing, initial and confirmatory testing may be conducted pursuant to the employer's written policy, which must comply with the department of transportation regulation on testing transportation employees. Iowa Code § 730.5(7)g. Finally, Iowa Code section 730.9(e) provides the employer shall establish a written policy regarding alcohol testing that sets forth the standard for concentration which will be deemed to violate the policy. That standard must not fall below .02.

Webster testified Clark admitted drinking alcohol the night before April 2, 2020, but reported she stopped drinking at 8:00 p.m. Clark and Berge denied Clark had been drinking the night before. Clark reported she tested positive because she had drank NyQuil and ingested menthol cough drops. This raises an issue of credibility.

During the hearing I assessed the credibility of Clark, Berge, and Webster by considering whether their testimony was reasonable and consistent with other evidence I believe, whether they had made inconsistent statements, their “appearance, conduct, memory and knowledge of the facts,” and their interest in the case. *State v. Frake*, 450 N.W.2d 817, 819 (Iowa 1990). I did not find Clark or Berge to be credible witnesses. I found Webster to be a credible witness.

Clark has an obvious interest in this case, the receipt of unemployment benefits. Webster is employed by Prestage and continues to work there. When I asked Clark, what her relationship was to Berge, she reported he was a friend. I inquired whether he was a boyfriend and she replied he was a friend. When I questioned Berge about their relationship he reported they were boyfriend and girlfriend. I found this troubling. Berge is Clark’s boyfriend and he has an interest in supporting her.

Prestage timely documented Clark reported drinking the night before when she was told Adams and Ross believed she was under the influence of alcohol. Menthol cough drops do not smell of the odor of an alcoholic beverage.

Clark reported she requested a blood test. Iowa Code section 730.5 does not require the employer offer blood testing for an alcohol test. Clark could have gone to a hospital or testing facility to request her own blood test; she did not.

In this case, Clark received a copy of the employer’s drug and alcohol use policy, and she was tested by a certified testing provider due to reasonable suspicion. The breath test revealed a BAC over .02. The confirmation test taken seventeen minutes later revealed a BAC again over .02. Prestage notified Clark of the results in-person and terminated her employment.

Prestage did not provide a copy of the policy at hearing. Webster did not testified regarding the policy’s testing procedure for alcohol testing. However, the laboratory that conducted the test did follow DOT regulations on breath testing of transportation drivers, as mandated by the statute. Prestage’s written policy provided the BAC at which Clark would be deemed to have violated the policy, or .04. Clark violated the minimum threshold established by the statute of .02. Prestage has established it substantially complied with the meaning and intent of Iowa Code section 730.5. Clark’s action of working with a BAC over .02 was in deliberate disregard of Prestage’s interests and amounts to misconduct. Benefits are denied.

DECISION:

Regular Unemployment Insurance Benefits Under State Law

The June 9, 2020 (reference 01) unemployment insurance decision denying unemployment insurance benefits is affirmed. Claimant was discharged for misconduct for a disqualifying reason. Unemployment insurance benefits are denied until the claimant has worked in and earned wages for insured work equal to ten times her weekly benefit amount after his separation date, and provided she is otherwise eligible.

Pandemic Unemployment Assistance (“PUA”) Under the Federal CARES Act

Even though the claimant is not eligible for regular unemployment insurance benefits under state law, the claimant may be eligible for federally funded unemployment insurance benefits under the CARES Act. Section 2102 of the CARES Act creates a new temporary federal program called

Pandemic Unemployment Assistance (“PUA”) that may provide up to 39 weeks of unemployment benefits. An individual receiving PUA benefits may also receive an additional \$600 weekly benefit amount under the Federal Pandemic Unemployment Compensation (“FPUC”) program if the individual is eligible for PUA benefits for the week claimed. The FPUC additional \$600 payment per week ends as of July 25th in Iowa. This means the \$600 weekly additional benefit will stop and at this time, no extension or change to the program has been made by Congress at this time. This does mean that you will see a corresponding decrease in your weekly benefit amount. The FPUC payments are not a state benefit and Iowa is unable to make any changes to the availability of this benefit. If a change takes place to this benefit in the future, IWD will share on the IWD website and social media. This decision does not address whether the claimant is eligible for PUA. If the claimant wishes to receive PUA benefits, the claimant must apply for PUA, as noted in the instructions provided in the “Note to Claimant” below:

Note to Claimant: If this decision determines you are not eligible for regular unemployment insurance benefits and 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, 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>.** This decision denies benefits. If this decision becomes final or if you are not eligible for PUA, you may have an overpayment of benefits.



Heather L. Palmer
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July 31, 2020
Decision Dated and Mailed

hlp/scn