

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

DOMINIC W POGWIZD
Claimant

BURKE MARKETING CORPORATION
Employer

APPEAL 15A-UI-05054-JCT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 04/12/15
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the April 23, 2015, (reference 01) unemployment insurance decision that denied benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on June 2, 2015. The claimant participated. The employer participated through Shelli Seibert.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a purchasing assistant and was separated from employment on March 30, 2015, when he was discharged.

The employer has a drug and alcohol policy that the claimant would have been made aware of at the time of hire. The final incident occurred on March 27, 2015 when two employees, Carrie and Lisa, reported to the claimant's manager that he smelled of alcohol. The employer brought the claimant into their training room and questioned the claimant about his use of alcohol. The claimant admitted he had taken a muscle relaxer from an old prescription in his name and also took a second medication for his pre-Crohn's disease. The claimant had mixed the two medications together and admitted to feeling a little "loopy." The claimant also admitted he wore Axe body spray, which could have contributed to the odor. The claimant was permitted to return to work before being told he was being suspended and investigated for the incident. There was conflicting evidence presented as to whether the claimant admitted to drinking the evening prior to his shift, and the employer did not request a drug or alcohol test to confirm. The claimant was subsequently discharged for violating the employer's drug and alcohol policy.

Prior to March 25, 2015, the claimant had a similar issue on August 8, 2014 and was issued a final warning. No drug or alcohol screening was performed in the course of the incident to confirm any substance in the claimant's system. The claimant was required to pay for and complete a drug and alcohol assessment and course as a part of the warning process. The claimant also voluntarily completed a treatment plan.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

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).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and the 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.

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation.

A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. The issue is not whether the employer made a correct decision in separating claimant, 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). A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

In this case, the claimant was discharged for violating the employer's drug and alcohol policy after a report of the claimant smelling of alcohol was made by the claimant's peers. The evidence presented by both parties is disputed as to whether the claimant admitted he had consumed alcohol the evening or morning of the day in question, when confronted by the employer. The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). Iowa Code § 730.5 allows drug testing of an employee if, among other conditions, the employer has "probable cause to believe that an employee's faculties are impaired on the job." However, the employer elected not to test the claimant to confirm if he was in fact, under the influence of alcohol or drugs on March 27, 2015.

In light of the claimant's denial and absent confirmation of actual substances in the claimant's body at the time he was performing work, the employer has not furnished sufficient evidence to corroborate the allegation against the claimant, and therefore not met its burden of proof to establish the claimant violated the employer's drug and alcohol policy. The employer has not met its burden of proof to establish a current or final act of misconduct, and, without such, the history of other incidents need not be examined.

Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant's conduct leading separation was misconduct under Iowa law. Since the employer has not met its burden of proof, benefits are allowed.

DECISION:

The April 23, 2015, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. The benefits claimed and withheld shall be paid, provided he is otherwise eligible.

Jennifer L. Coe
Administrative Law Judge

Decision Dated and Mailed

jlc/pjs