

**IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

AMY L JONES
Claimant

THE SHERWIN-WILLIAMS CO
Employer

APPEAL 24A-UI-04002-PT-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 03/17/24
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge
Iowa Code § 730.5 – Private Sector Drug-free Workplaces
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, The Sherwin-Williams Co., filed an appeal from a decision of a representative dated April 10, 2024, (reference 01) that held the claimant eligible for unemployment insurance benefits after a separation from employment. After due notice, a telephone hearing was held on May 8, 2024. The claimant, Amy Jones, participated personally. The employer participated through Human Resources Manager Deanna Baker. The administrative law judge took official notice of the administrative record.

ISSUES:

Whether the claimant was discharged for disqualifying, job-related misconduct.
Whether the claimant has been overpaid any unemployment insurance benefits, and if so, whether the repayment of those benefits to the agency can be waived.
Whether any charges to the employer's account can be waived.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: The claimant began working for the employer on July 6, 2023. The claimant worked as a sales delivery driver, wherein she delivered products to clients throughout an approximately 80-square mile delivery area. The claimant last worked for the employer on February 22, 2024. Her employment ended on February 28, 2024.

The employer maintains a drug-free workplace policy. The policy provides that the employer may drug test employees based on reasonable suspicion. The policy further provides that any amount of any prohibited substance violates the employer's policy and may result in discipline up to and including termination of employment. The claimant received a copy of the policy on her hire date.

On February 22, 2024, two clients reported to the district manager that, earlier in the day, when the claimant arrived at their store to deliver products, the claimant had smelled of marijuana.

The district manager called the claimant's supervisor and instructed the supervisor to have the claimant submit to a reasonable suspicion drug test. When the claimant returned to the employer's premises, the claimant's supervisor called the claimant into a meeting and asked her to submit to a drug test, which the claimant agreed to do. The employer did not tell the claimant what drugs would be tested for in the drug screen.

The claimant was transported to the Doctor's Now Walk-In Clinic for testing. A nurse escorted the claimant to a private restroom for the claimant to take a urinalysis drug screen. The claimant provided a sufficient sample. The laboratory technician did not split the sample into two samples at the time of collection in front of the claimant.

On February 28, 2024, the employer called and informed the claimant that her employment was being terminated effective immediately because the drug screen was positive for marijuana. The employer never mailed a letter notifying the claimant of the test results or that the claimant had the right to retest any split sample that may have been collected. The employer did not offer a copy of the drug screen results into evidence. The claimant did not have any prior verbal or written warnings for violating the employer's drug and alcohol policy.

The claimant's administrative records indicate that the claimant filed her original claim for benefits with an effective date of March 17, 2024. The claimant has filed weekly claims for benefits for six-weeks between March 17 and April 27, 2024. The claimant has received total unemployment insurance benefits of \$1,482.00. The employer participated in fact finding through its SIDES response, which contained sufficiently detailed information concerning the circumstances surrounding the discharge.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa Code section 96.5(2)(a) and (d) provide, in relevant part:

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.

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

...

(9) 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.

Iowa Code section 96.5(14) provides:

14. Marijuana or controlled substance use in the workplace — disqualified.

a. For purposes of this subsection, unless the context otherwise requires:

(1) "Controlled substance" means the same as defined in section 124.101.

(2) "Marijuana" means the same as defined in section 124E.2.

b. If the department finds that the individual became separated from employment due to ingesting marijuana in the workplace, working while under the influence of marijuana, or testing positive for any other controlled substance, for which the individual did not have a current prescription or which the individual was otherwise using unlawfully, under a drug testing policy pursuant to section 730.5 or any other procedures provided by federal statutes, federal regulations, or orders issued pursuant to federal law.

c. A disqualification under this subsection 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.

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). The issue is not whether the employer made a correct decision in separating the claimant from employment, 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). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

Testing under Iowa Code section 730.5(4) allows employers to test employees for drugs and/or alcohol but requires the employer "adhere to the requirements . . . concerning the conduct of such testing and the use and disposition of the results." Iowa Code section 730.5(1)*j* allows drug testing of an employee upon "reasonable suspicion" that an employee's faculties are impaired on the job or on an unannounced random basis.

Testing shall include confirmation of initial positive test results. Iowa Code section 730.5(7)(i)(1) mandates certain action after a medical review officer (MRO) reports a positive test result to the employer, upon a confirmed positive drug test by a certified laboratory. After such a positive test report, the employer must notify the employee both of the test results by certified mail return receipt requested, and of the right to obtain a confirmatory or split-sample test before taking disciplinary action against an employee. Iowa Code section 730.5(9) requires that a written drug screen policy be provided to every employee subject to 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." *Eaton v. Iowa Emp't Appeal Bd.*, 602 N.W.2d 553, 557, 558 (Iowa 1999).

In this case, the claimant was discharged due to failing a drug test. However, the employer has not met the strict requirements under Iowa Code section 730.5. While the employer certainly may have been within its rights to test and discharge the claimant, the employer failed to collect a split sample of claimant's urine, it failed to notify the claimant in writing of what her test results consisted of, and it failed to notify the claimant of her opportunity for a second split sample test as required by Iowa Code section 730.5. Because the employer failed to substantially comply with the statute, the employer cannot use the results of the drug screen as a basis for disqualification from benefits. As such, the separation from employment with this employer is not disqualifying and benefits are allowed, provided the claimant is otherwise eligible.

Because the claimant's separation was not disqualifying, the issues of overpayment, repayment and chargeability are moot.

DECISION:

The April 10, 2024 (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment on February 28, 2024, for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible. The issues of overpayment, repayment, and participation are moot.



Patrick B. Thomas
Administrative Law Judge

May 17, 2024
Decision Dated and Mailed

pbt/scn

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:

**Iowa Employment Appeal Board
6200 Park Avenue Suite 100
Des Moines, Iowa 50321
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.

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 then file a petition for judicial review in district court.

2. If no one files 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 Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf> or by contacting the District Court Clerk of Court <https://www.iowacourts.gov/iowa-courts/court-directory/>.

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:

**Iowa Employment Appeal Board
6200 Park Avenue Suite 100
Des Moines, Iowa 50321
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.

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 nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiriera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que se encuentra en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf> o comunicándose con el Tribunal de Distrito Secretario del tribunal <https://www.iowacourts.gov/iowa-courts/court-directory/>.

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.