

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOSEPH W SCHMILLEN
Claimant

APPEAL NO. 10A-UI-13286-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 07/25/10
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 730.5 – Private Sector Drug-Free Workplaces

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the September 22, 2010 (reference 02) decision that denied benefits. After due notice was issued, a telephone conference hearing was held on November 9, 2010. Claimant participated and was represented by Victoria Siegel, Attorney at Law. Employer participated through Assistant Vice President Transportation Human Resources Lisa Stowater, Bobby Hussman, and Mark Wuest and was represented by Dan Speir of Unemployment Insurance Services. Employer's Exhibits 2 through 6 were admitted to the record. Proposed exhibit labeled 1 was not offered. Claimant's Exhibit C was admitted to the record. Proposed exhibits labeled A and B were not offered.

ISSUE:

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of benefits.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant most recently worked full-time as a maintenance worker from January 1984 and was separated from employment on August 3, 2010. Claimant had a workplace accident on July 20, 2010, which triggered a drug screen pursuant to employer's policy. (Employer's Exhibits 1, 2, and 3 and Claimant's Exhibit A) The first part of the split sample taken at Cherokee Regional Medical Center on July 20, 2010 was positive for THC. (Employer's Exhibit 4 and Claimant's Exhibit B) Claimant did not get results from the first drug screen at Cherokee except by verbal notification from Stowater. Employer then directed that the second sample be tested, so the sample was sent to Quest Diagnostics that was tested by GCMS (gas chromatography mass spectrometry required for national laboratory certification) and resulted in a positive finding of marijuana metabolite on July 26, 2010. (Employer's Exhibit 5) A written certified letter of the results was sent to claimant on July 27, 2010. (Employer's Exhibit 6) There was nothing in the letter (Employer's Exhibit 6) that gave him split sample rights or information about how to obtain an independent test. Nonetheless, claimant sent employer a fax dated July 30, 2010 for another sample test. Assistant Manager of Human

Resources Mandy Hirschman told him the MRO at Sanford Occupational Medicine was the second sample and he did not have a second test of the sample. Claimant declined to answer if he had ingested marijuana. Claimant has a history of false positives. He was not offered an opportunity to obtain substance abuse evaluation and treatment.

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 § 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 proving disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982).

Iowa Code § 730.5(7)(i)(1) mandates that an employer, upon a confirmed positive drug or alcohol test by a certified laboratory, notify the employee of the test results by certified mail and the right to obtain a confirmatory test before taking disciplinary action against an employee. Upon a positive drug screen, Iowa Code § 730.5(9)(g) requires, under certain circumstances, that an employer offer substance abuse evaluation and treatment to an employee the first time the employee has a positive drug test. 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 Employment Appeal Board*, 602 N.W.2d 553, 557, 558 (Iowa 1999).

The employer failed to give claimant notice of the test results according to the strict and explicit statutory requirements, and failed to allow him an opportunity for another test even if a split sample was taken and retested by the employer. The employer did not provide information to the claimant about an employee assistance program or other substance abuse programs as required by Iowa Code § 730.5(9)(c). Thus, employer cannot use the results of the drug screen as a basis for disqualification from benefits. Benefits are allowed.

DECISION:

The September 22, 2010 (reference 02) decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/kjw