

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SUSAN V MANESS

Claimant

HOMEMAKERS PLAZA INC

Employer

APPEAL NO. 11A-UI-04055-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 02/20/11

Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

Section 730.5 – Drug Testing

STATEMENT OF THE CASE:

The claimant appealed a department representative's decision dated March 22, 2011, reference 01, that she was discharged for misconduct on February 22, 2011, and that allowed benefits. A hearing was held on April 21, 2011. The claimant participated. Ed Masterson, operations manager, and Jamie Smith, HR manager, participated for the employer.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the witness testimony and having considered the evidence in the record, finds that: The claimant worked as a full-time account manager in the customer service department from July 31, 2006 to February 22, 2011. The claimant received the Drug & Alcohol policy of the employer, which contains a provision she is subject to random drug testing. The employer provides an active employee list to the testing authority (Concentra), and it randomly selects employees to test from that list.

On February 16, 2011, claimant was one of 20 employees (7 percent) selected for random testing and she consented. The claimant tested positive for marijuana and the testing authority notified the employer by e-mail. The employer handed claimant an employment termination letter on February 22 for a positive drug test. The letter does not provide claimant notice that she has the right to a re-test at her expense of any split sample.

The claimant denies she uses drugs. She does not recall the testing authority obtained a split urine sample. Although she disagreed with the testing result, she was not notified of the opportunity to re-test. She received no testing result notification from a medical review officer (MRO).

REASONING AND CONCLUSIONS OF LAW:

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.

The administrative law judge has reviewed the records and files herein and concludes that the employer failed to establish misconduct in the discharge of the claimant on February 22, 2011, because it failed to follow the drug testing requisites of Iowa Code section 730.5.

The law requires that an employee be given written notice by certified mail of a positive drug test, and that he or she be advised of his right to request and obtain a confirmatory test of a secondary sample. The employer handed claimant a termination letter of the positive test, but it failed to send her a notice by certified mail with the right to request a confirmatory test. Claimant does not believe a second sample was secured at the time of testing, and the employer witness did not know about it. If there is any defect in the testing procedure, the result may not be used to establish job-disqualifying misconduct.

DECISION:

The decision of the representative dated March 22, 2011, reference 01, is reversed. The claimant was not discharged for misconduct in connection with employment on February 22, 2011. Benefits are allowed, provided the claimant is otherwise eligible.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/kjw