

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

GARY B KLEIN
Claimant

BERTCH CABINET MFG INC
Employer

APPEAL 16A-UI-10284-JP-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 12/27/15
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the September 12, 2016, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on October 5, 2016. Claimant participated. Employer participated through human resources director Mitzy Tann. Production manager Erv Thomb attended the hearing on behalf of the employer. Jeremy Robb registered for the hearing on behalf of the employer, but did not attend the hearing. Employer exhibit one was admitted into the record with no objection.

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: Claimant was employed full-time as a plywood finish apprentice from February 3, 2004, and was separated from employment on August 23, 2016, when he was discharged.

Claimant did receive a copy of employer's drug and alcohol use policy. Claimant submitted to a drug screen at a certified laboratory on August 18, 2016, because of post-accident test. Employer Exhibit One. Claimant was injured on August 18, 2016 and required stitches at Occupational Health at Allen Hospital. Claimant's injury was a reportable injury under Iowa Chapter 88. The result of claimant's drug test/screen was positive for marijuana. Employer's Exhibit One. The employer did not provide the results to claimant by certified mail with return receipt requested. The medical review officer (MRO) communicated with claimant about his positive drug screen on August 22, 2016. The lab then informed the employer about claimant's positive drug screen. Employer Exhibit One. On August 23, 2016, the employer met with claimant regarding his positive drug screen. Claimant stated that this was not a one-time occurrence and the he takes a hit every once in a while. On August 25, 2016, claimant came in to pick up more information and the employer gave him a letter dated August 25, 2016. Employer Exhibit One. Claimant signed at the bottom of the August 25, 2016 letter that he had received it. Employer Exhibit One. The letter explained to claimant that he could request a

second confirmatory test on the existing specimen within seven days from the date of this positive drug test notification. Employer Exhibit One. Claimant was given instructions about a second confirmatory test, but did not pursue a split sample test. Employer Exhibit One.

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. Benefits are allowed.

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).

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 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. It also allows testing as condition of continued employment or hiring. Iowa Code § 730.5(4). Iowa Code § 730.5(9) requires that a written drug screen policy be provided to every employee subject to testing. Iowa Code § 730.5(7)(i)(1) mandates:

If a confirmed positive test result for drugs or alcohol for a current employee is reported to the employer by the medical review officer, the employer *shall* notify the employee in writing by certified mail, return receipt requested, of the results of the test, the employee's right to request and obtain a confirmatory test of the second sample collected pursuant to paragraph "b" at an approved laboratory of the employee's choice, and the fee payable by the employee to the employer for reimbursement of expenses concerning the test.
(emphasis added)

Iowa Code § 4.1(30)(a) states that "[t]he word "shall" imposes a duty.

Although the employer hand delivered a letter to claimant discussing his rights for a confirmatory test of the second sample, the employer failed to mail the letter by certified mail, return receipt requested, as mandated by Iowa Code § 730.5(7)(i)(1). "Although accurate testing inures to the benefit of both the employer and the employee, the provisions with respect to a second confirmatory test appear to be for the benefit and protection of the employee in particular in view of the fact that it is the employee who determines whether the second confirmatory test will be done." *Harrison v. Employment Appeal Bd.*, 659 N.W.2d 581, 587 (Iowa 2003). "The notice requirements at issue in the case before us relate to the employee's opportunity to require a second confirmatory test." *Id.* "Thus, in viewing whether the employer's conduct in this case substantially complied with the statute, we must determine whether the employer's actions reasonably accomplished the legislature's objective to protect the employee from adverse employment action based on an erroneous test result." *Id.* Iowa Code § 730.5(7)(i)(1) "requires that the employer give an employee written notice of a positive test result." *Id.* "Such notice *must* be by certified mail, return receipt requested." *Id.* (emphasis added). "It is important to consider how these requirements serve to protect the employee." *Id.* "A written document, particularly one sent by certified mail, conveys a message that the contents of the document are important." *Id.* "Thus, an employee receiving notice in this fashion would be more likely to consider his decision with respect to a second test to be an important one." *Id.* "Likewise, he would more deliberately reflect on his options and the ramifications of his decision." *Id.*

"We have previously held that substantial compliance is compliance with respect to those requirements that are necessary "to assure the reasonable objectives" of the statute are met." *Id.* at 586 (*quoting Superior/Ideal, Inc. v. Bd. of Review*, 419 N.W.2d 405, 407 (Iowa 1988)). In an unpublished decision, the Iowa Court of Appeals found that although the employer handed the claimant a "Positive Drug or Alcohol Test Notification," which the claimant signed for, and the employer orally discussed a second test, the Court found there was not substantial compliance with the notice requirements of Iowa Code § 730.5(7)(i)(1). *Skipton v. S & J Tube, Inc.*, 822 N.W.2d 122, 2012 WL 3860446, (Iowa Ct. App. 2012) (unpublished decision).

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 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.

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). While the employer certainly may have been within its rights to test and fire claimant, it failed to provide

him sufficient notice of the test results “by certified mail, return receipt requested,” according to the strict and explicit statutory requirements of Iowa Code § 730.5(7)(i)(1). Thus, the employer cannot use the results of the drug screen or any subsequent admission of drug use as a basis for disqualification from benefits. Benefits are allowed.

DECISION:

The September 12, 2016, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/rvs