

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

FRANCESCA F BROWN
Claimant

PDM PRECAST INC
Employer

APPEAL 24A-UI-06343-LJ-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 06/16/24
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge from employment

Iowa Code § 96.5(14) – Marijuana or controlled substance use in the workplace—disqualified

STATEMENT OF THE CASE:

On July 11, 2024, employer PDM Precast Inc. filed an appeal from the July 8, 2024 (reference 01) unemployment insurance decision that allowed benefits to claimant Francesca Brown, determining the employer dismissed her on June 7, 2024 and did not establish the dismissal was for willful or deliberate misconduct. The Unemployment Insurance Appeals Bureau mailed notice of the hearing on July 12, 2024. Administrative Law Judge Elizabeth A. Johnson held a telephonic hearing at 10:00 a.m. on Thursday, July 25, 2024. Claimant Francesca F. Brown personally participated. Employer PDM Precast Inc. participated through Andrew Nelson, Human Resources Analyst. Claimant's Exhibit A and Employer's Exhibits 1, 2, 3, 4, 5, and 6 were received and admitted into the record without objection. Claimant's Exhibit B was not admitted as it was not provided to the employer prior to the hearing. The administrative law judge took official notice of the administrative record to incorporate Iowa Workforce Development (IWD) mainframe data into the hearing record.

ISSUE:

Whether claimant was discharged from employment for any disqualifying reason.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began employment with PDM Precast Inc. on April 11, 2022. She worked full-time hours for the company, most recently as a third shift right hand. Claimant's employment ended on June 13, 2024, when the employer discharged her.

On June 7, 2024, the employer selected claimant as one of multiple employees for random drug testing. Claimant submitted to an initial mouth swab; this test came back positive for opiates. Claimant disclosed that she was taking prescription pain medication. The employer then sent her to Mercy Occupational Health East for a urinalysis. A Mercy employee collected claimant's urine sample.

Medical Review Officer Dr. Brian Heinen of EScreen processed claimant's urine sample and determined the sample was positive for marijuana. (Exhibit 2) This result was verified on June 12, 2024. (Exhibit 2) The employer discharged claimant the following day. Claimant did not

receive her positive test result via certified mail. She did not know whether a split sample was collected, and she was not notified that she had the right to have a split sample tested at her own cost to challenge the positive test result.

The employer maintains a written drug testing policy. (Exhibit 4) This policy states in part:

A confirmed positive drug or alcohol test, an altered test result or a diluted test result of a current Employee shall be provided to the Employee by the Employer in writing, by certified mail, return receipt requested. In that writing, the Employee will be told that he/she has the right to request and obtain a confirmatory test of the second sample collected at an approved laboratory of the Employee's choice. The fees for such a confirmatory test shall be payable by the Employee. The employee will have seven (7) days after receipt of the letter to (a) request the test; (b) identify the laboratory to perform the test and (c) pay for the test.

On June 11, 2024, claimant had her own doctor conduct a urinalysis drug screening for her. (Exhibit A) This test came back positive for marijuana metabolite. (Exhibit A) Claimant's doctor notes on the results form that claimant takes CBD gummies, and those account for the metabolite in her system. (Exhibit A)

Claimant opened the claim for unemployment insurance benefits effective June 16, 2024. She has filed five weekly continued claims for benefits, most recently for the week ending July 20, 2024. Claimant has received benefits in the amount of \$3,020.00. Iowa Workforce Development held a fact-finding interview on July 5, 2024. Nelson personally participated in the fact-finding interview and submitted documentation to the deputy.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason, as the employer has not established the statutory requirements in Iowa Code section 730.5.

In 2020, the Employment Security Law was amended to add a marijuana-specific ground for disqualification. Iowa Code Section 96.5(14) now provides:

96.5 Causes for disqualification.

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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.

Iowa law disqualifies an employee from receiving benefits who tests positive for any controlled substance, including marijuana. Iowa Code § 96.5(14). Before the employee can be disqualified by such a positive test result, the employer must establish they have a drug testing policy that complies with Iowa's private sector drug testing requirements and that they have administered their test in compliance with that policy. (Iowa Code §§ 96.5(14(b); 730.5.)

An employer cannot establish disqualifying misconduct based on a drug test performed in violation of Iowa's drug testing laws. *Harrison v. Employment Appeal Board*, 659 N.W.2d 581 (Iowa 2003); *Eaton v. Employment Appeal Board*, 602 N.W.2d 553, 558 (Iowa 1999). "It would be contrary to the spirit of chapter 730 to allow an employer to benefit from an unauthorized drug test by relying on it as a basis to disqualify an employee from unemployment compensation benefits." *Eaton*, 602 N.W.2d at 558. An employer must only substantially comply with the requirements of the private sector drug testing statute; strict compliance is not necessary. *Sims v. NCI Holding Corp.*, 759 N.W.2d 333 (Iowa 2009). "Substantial compliance is said to be compliance in respect to essential matters necessary to assure the reasonable objectives of the statute." *Sims v. NCI Holding Corp.*, 759 N.W.2d 333, 338 (Iowa 2009) (quoting *Superior/Ideal, Inc. v. Bd. of Review*, 419 N.W.2d 405, 407 (Iowa 1988)).

Section 730.5(7) provides in relevant part:

i. (1) 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.*** The fee charged an employee shall be an amount that represents the costs associated with conducting the second confirmatory test, which shall be consistent with the employer's cost for conducting the initial confirmatory test on an employee's sample. If the employee, in person or by certified mail, return receipt requested, requests a second confirmatory test, identifies an approved laboratory to conduct the test, and pays the employer the fee for the test within seven days from the date the employer mails by certified mail, return receipt requested, the written notice to the employee of the employee's right to request a test, a second confirmatory test shall be conducted at the laboratory chosen by the employee. The results of the second confirmatory test shall be reported to the medical review officer who reviewed the initial confirmatory test results and the medical review officer shall review the results and issue a report to the employer on whether the results of the second confirmatory test confirmed the initial confirmatory test as to the presence of a specific drug or alcohol. If the results of the second test do not confirm the results of the initial confirmatory test, the employer shall reimburse the employee for the fee paid by the employee for the second test and the initial confirmatory test shall not be considered a confirmed positive test result for drugs or alcohol for purposes of taking disciplinary action pursuant to subsection 10.

Iowa Code §730.5(7)“i”(1) (emphasis added). An employer may not notify the employee of the test results and their rights to challenge those results via telephone; the requirement to notify an employee in writing is essential. See *Harrison v. Employment Appeal Board*, 659 N.W.2d 581 (Iowa 2003).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

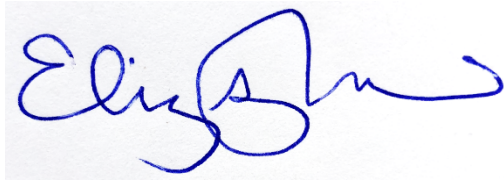
If a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976). Mindful of the ruling in *Crosser*, and noting that the claimant presented direct, first-hand testimony while the employer relied upon second-hand witnesses, I conclude the employer has not met its burden of proof.

The employer did not present convincing evidence that claimant was properly informed of her positive drug test result or her right to have the split sample tested. Claimant denies receiving a letter informing her of her results and described having to compel the employer to turn over her results, and Nelson's sweeping and overbroad statements "That sounds categorically false to me" and "It was certainly sent to her home" were not sufficient to credibly rebut claimant's firsthand testimony. Because the employer failed to comply with the statutory requirements for private-sector drug testing, it cannot use the drug test results as a basis to disqualify claimant. The employer has not presented any other evidence of disqualifying misconduct. Benefits are allowed, provided claimant is otherwise eligible.

Because benefits are allowed based on this separation, the issues of overpayment and chargeability are moot.

DECISION:

The July 8, 2024 (reference 01) unemployment insurance decision is affirmed. The employer discharged claimant from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The issues of overpayment and chargeability are moot.



Elizabeth A. Johnson
Administrative Law Judge

July 29, 2024
Decision Dated and Mailed

lj/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/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.