

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHRISTOPHER L DUNDY
Claimant

APPEAL NO. 11A-UI-14404-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

PELLA CORPORATION
Employer

OC: 02/06/11
Claimant: Appellant (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Christopher Dundy appealed an adjudicated decision dated October 27, 2011, reference 01, which denied unemployment insurance benefits. After due notice, a telephone conference hearing was held on December 13, 2011. Mr. Dundy participated. The employer participated by Ms. Rebecca Lovitt, Human Resource Representative.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered all of the evidence in the record, the administrative law judge finds: Christopher Dundy was employed by the Pella Corporation from July 28, 2003 until September 28, 2011 when he was discharged from employment. Mr. Dundy worked as a full-time Assembler III and was paid by the hour. His immediate supervisor was Todd Pringle.

Mr. Dundy was discharged when he violated the company's drug policy by testing positive for marijuana in his system in a drug test that was conducted on September 23, 2011. On that date the claimant was in the company's Human Resource area and smelled of alcohol. Based upon the suspicion that Mr. Dundy had violated company policy by consuming alcohol during or shortly before work, he was further questioned by Pam Fitzsimmons, Manager of the company's Human Resource Department. The questioning was observed by another Human Resource Department employee as well. Company Human Resource personnel and supervisors receive training and utilize a company checklist in an effort to determine whether a worker is showing any observable signs that they may have violated the company's drug policies. Based upon the observation of the trained Human Resource Manager, a decision was made to require Mr. Dundy to undergo alcohol as well as drug testing that day.

The employer has a written drug policy that informs the employee of the drug testing procedures and for which drugs the employer will be testing. The claimant was given the drug test at a

testing facility during working hours and the specimens were split, properly identified and sent to a certified laboratory for test results. The claimant was given an opportunity to inform the medical review officer of any drugs he was taking that might have an effect on the outcome of the test. During the conversation with the medical review officer, Mr. Dundy admitted smoking marijuana the previous weekend. The claimant tested positive for marijuana and was notified by certified mail, return receipt requested, of the positive test result and his right to obtain a confirmatory test of the second sample that was taken at the time of the initial test. Mr. Dundy, who admitted to the personnel department manager that he had smoked marijuana, did not contact the employer to request a subsequent test.

It is the claimant's position that he may have smelled of alcohol from drinking the night before but that he was not under the influence of alcohol when he reported for work on the day in question. It is the claimant's further position that his conduct or statements during questioning should not have led the employer to require a drug screen.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits. It does.

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 to prove the claimant was discharged for work-connected misconduct as defined by the Unemployment Insurance Law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant was discharged for violation of the employer's drug and alcohol policy due to his positive test result for marijuana. Iowa Code § 730.5 sets forth the rules by which a private company may screen its employees for the use of illegal drugs. The employer has a written drug policy per Iowa Code § 730.5(9)(b) and tested the claimant for cause. The evidence establishes that supervisory personnel and Human Resource personnel undergo training to detect observable signs of drug impairment or the use of drugs by employees. The claimant was advised of the drugs to be tested and was given the opportunity to advise the medical review officer of any drugs he was taking that might have affected the outcome. The claimant, however, admitted to the use of marijuana. Iowa Code § 730.5(7)(c)(2). The test was performed during the work day at a medical office. Split samples were taken at the time of collection. Iowa Code § 730.5(6)(7)(a-c). A medical review officer reviewed and interpreted the confirmed positive test results and notified the claimant of the positive test results before returning the results to the employer. Iowa Code § 730.5(7)(d).

The claimant was notified by regular mail and by certified mail, return receipt requested, of the positive test results. Included was the right of the claimant to obtain a confirmatory test of the secondary sample. Mr. Dundy was notified both verbally and by mail of the positive test results. The claimant elected not to claim the certified letter, return receipt requested.

The claimant tested positive for marijuana in a properly conducted drug test and he had been using marijuana. The claimant was aware of the company policy and was aware that violation of policy could result in his discharge from employment. Claimant had not sought assistance from the company's employer's assistance program prior to his positive test results being reported to the company.

Work-connected misconduct as defined by the Unemployment Insurance Law has been established in this case and benefits are denied.

DECISION:

The representative's decision dated October 27, 2011, reference 01, is affirmed. The claimant is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount and meets all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs