

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

KYLE M SCHMIDT
203 - 13TH AVE NW
INDEPENDENCE IA 50644

LABOR READY MIDWEST INC
ATTN-PAYROLL TAX DEPT
PO BOX 2910
TACOMA WA 98401-2910

LABOR READY MIDWEST INC
C/O TALX UC EXPRESS
P O BOX 283
ST LOUIS MO 63166-0283

LABOR READY MIDWEST INC
1818 WILLISTON AVE
WATERLOO IA 50702

Appeal Number: 05A-UI-07554-SWT
OC: 06/05/05 R : 03
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

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.

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.

YOU MAY REPRESENT yourself in this appeal or you may 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. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant appealed an unemployment insurance decision dated July 11, 2005, reference 01, that concluded the claimant's discharge was not for work-connected misconduct. A telephone hearing was held on August 10, 2005. The claimant participated in the hearing. Rick Bartlett participated in the hearing on behalf of the employer.

FINDINGS OF FACT:

The employer is a staffing service that provides workers to client businesses on a temporary or indefinite basis. The claimant's last period of regular employment was from September 2004 to April 13, 2005. The claimant was informed and understood that under the employer's work rules, employees were required to submit to a drug test if they are involved in a workplace accident and were subject to termination if they tested positive for drugs.

Pursuant to the policy, the claimant was required to submit to a drug test on April 13, 2005, after he was injured by a nail gun while working for a construction company. A urine sample was taken from the claimant and analyzed using an initial drug screen test and a subsequent confirmatory test by a laboratory. The test results were positive for the presence of marijuana. The claimant had received painkiller and tetanus shot before the drug test was conducted.

The claimant was not notified in writing by certified mail, return receipt requested, of the results of the test, his right to request and obtain a confirmatory test of the second sample at an approved laboratory of his choice, and the fee payable to the employer for reimbursement of expenses concerning the test. There is no evidence that the test results were reviewed by a medical review officer or that the claimant was given the opportunity to provide information that might be relevant to the test, including medical information and prescription or nonprescription drugs currently or recently used.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance 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.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The Iowa Supreme Court has ruled that 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). As the court in Eaton stated, "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.

The following essential legal requirements of Iowa Code section 730.5 have not been met. The employer failed to notify the claimant by certified mail, return receipt requested, of the test results and his right to have an independent test performed on the second sample at an approved laboratory. Iowa Code section 730.5-7-i(1). There is no evidence that the employer has an awareness program to inform employees of the dangers of drug and alcohol use in the workplace as required by Iowa Code section 730.5-9-c. No proof was presented that the sample was analyzed by a certified laboratory using an initial drug screen followed by a confirmatory test using a chromatographic or other comparably reliable technique in accordance with the procedures required by Iowa Code section 730.5-7-e & -f. There is no evidence that the test results were reviewed by a medical review officer or that the claimant was given the opportunity to provide information that might be relevant to the test, including medical information and prescription or nonprescription drugs currently or recently used. Iowa Code section 730.5-7-c(2) & -g. All of these are essential requirements because they protect employees from having an adverse employment action taken against them based on false positive test results or without being fully aware of the employer's drug and alcohol testing program. The evidence, therefore, fails to establish substantial compliance with Iowa Code section 730.5.

Finally, during the hearing, the claimant admitted using marijuana while off duty a few weeks before the test was performed. In the Eaton case, however, the Iowa Supreme Court focused on whether the drug test complied with the law and not whether the claimant had admitted to using drugs. This was because the reason for the discharge was the positive test result. Likewise, in this case, the claimant was discharged due to the positive test result. Therefore, the claimant is not subject to disqualification because the testing procedures used by the employer did not substantially comply with state law.

DECISION:

The unemployment insurance decision dated July 11, 2005, reference 01, is affirmed. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

saw/kjw