

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

BRIAN J BERGMANN
Claimant

BUILDING PRODUCTS INC OF IOWA
Employer

APPEAL 15A-UI-06535-SC-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 05/17/15
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the June 2, 2015, (reference 01) unemployment insurance decision that denied benefits based upon the determination he was placed on disciplinary suspension for violating the employer's rules. The parties were properly notified of the hearing. A telephone hearing was held on July 8, 2015. Claimant Brian Bergmann participated on his own behalf. Employer Building Products Inc. of Iowa participated through Human Resources Manager Hollie Engle. Employer's Exhibits 1 and 2 were received and admitted into the record without 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: The claimant was employed full time as a sprayer in the Pre-Finish Department beginning April 11, 2011, and was separated from employment on May 19, 2015. On May 15, 2015, the employer changed its drug testing policy to allow for random drug testing. The claimant received a copy of the policy on the same day. On May 19, 2015, the employer selected all of its employees in multiple facilities in multiple states for drug testing under the random drug testing policy.

On May 19, 2015, during his shift, the claimant's split sample was collected by Allen Occupational Health Services in the bathroom of the employer's facility. The initial result was non-negative. The only two possible outcomes at that stage of testing were negative or non-negative. His sample was then sent to Clinical Reference Lab in Kansas. Ten days later, the lab notified the employer that the claimant tested positive for amphetamines. The employer notified the claimant by certified mail, return receipt requested, that he had been terminated based on a positive result and he had the option of having his second sample tested by another lab at his own expense. The claimant failed to collect the certified letter and it was returned to the employer.

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 law allows for unannounced drug or alcohol testing of employees. Iowa Code § 730.5(4). This statute permits an employer to conduct testing on a periodic basis, without advance notice, and without individual suspicion. Iowa Code § 730.5(1)(l). The definition of "unannounced drug or alcohol testing" includes the following language:

The selection of employees to be tested from the pool of employees subject to testing shall be done based on a neutral and objective selection process by an entity independent from the employer and shall be made by a computer-based random number generator that is matched with the employees' social security numbers, payroll

identification numbers, or other comparable identifying numbers in which each member of the employee population subject to testing has an equal chance of selection for initial testing, regardless of whether the employee has been selected or tested previously. The random selection process shall be conducted through a computer program that records selection attempt by date, time, and employee number.

Id. The statute clearly states that in order to qualify as an unannounced or random drug test of employees without individual suspicion, the selection of employees shall or must be made by an independent entity using a computer-based random number generator. The statute does not have a provision allowing employers to drug test all of their employees without cause.

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). By not following the employee selection method prescribed by the statute, the employer conducted an unauthorized drug test of the claimant. Thus, the employer cannot use the results of the drug screen as a basis for disqualification from benefits. Benefits are allowed.

DECISION:

The June 2, 2015, (reference 01) decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

Stephanie R. Callahan
Administrative Law Judge

Decision Dated and Mailed

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