

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

JILL I O'CONNOR Claimant	68-0157 (9-06) - 3091078 - EI
MIDAMERICAN ENERGY COMPANY Employer	APPEAL NO. 11A-UI-14647-VST ADMINISTRATIVE LAW JUDGE DECISION
	OC: 10/16/11 Claimant: Appellant (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from a representative's decision dated November 2, 2011, reference 01, which held the claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on December 8, 2011. Claimant participated. The claimant was represented by Jay Smith, attorney at law. The employer participated by Brad De Boer, senior laborer and employee relations representative. The employer was represented by Peg Roy, attorney at law. The record consists of the testimony of Brad De Boer; the testimony of Jill O'Connor; and Employer's Exhibits 1 through 8.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a natural gas and electric utility company. The claimant was hired on April 8, 1985. Her last day of work was October 12, 2011. She was terminated on October 12, 2011. At the time of her termination, the claimant's job title was Office Services Technician II. She worked in the print shop. There is a collective bargaining agreement between the employer and the International Brotherhood of Electrical Workers (IBEW) Local 499. The claimant is part of the workers subject to the collective bargaining agreement. The claimant was a full time employee.

The employer has a written anti-drug and alcohol misuse prevention plan. The claimant was provided a copy of that plan and had access to a copy of the plan online. The claimant was part of the pool for non-DOT workers. All non-DOT workers are put in a pool and employees are selected for random drug screenings electronically by a third-party provider and sent to the employer. The claimant was one of the individuals randomly selected and whose name was sent to the employer for testing on October 6, 2011. The claimant was sent to Iowa Methodist Occupational Health Center in Des Moines, Iowa, and provided a urine sample. The sample was then sent for testing to Quest Laboratories. (Exhibit 2) The test was positive for marijuana. The claimant was called by the lab and told the results of her test and she was asked about any other medication that she had been taking.

The employer was then notified about the positive drug test. The claimant was placed on crisis suspension and told to go home. A certified letter, return receipt requested, was sent to the claimant dated October 12, 2011. In that letter, the claimant was advised in writing about the results of the test and told that she had the right to request a split sample be tested at a laboratory of her choice. She was told the cost of the test was \$50.00 and that if the split sample tested negative, she would be reimbursed the cost of the test. (Exhibit 8) The claimant declined to exercise her right to have a split sample taken.

The employer's policy states that a positive drug test results in termination. The claimant was terminated on October 12, 2011. The claimant admitted that she took one hit of marijuana at a party. She denied that she was a drug user.

REASONING AND CONCLUSIONS OF 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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Iowa law permits employers to conduct drug testing in the workplace provided the employer complies with the outline selection process. Iowa Code section 730.5(8). An employer

can reasonably expect that an employee will comply with its policies, including drug testing in the workplace. The employer has the burden of proof to show misconduct.

Iowa Code section 730.5 provides the authority under which a private sector employer doing business in Iowa may conduct drug or alcohol testing of employees. In Eaton v. Employment Appeal Board, 602 N.W.2d 553 (Iowa 1999), the Supreme Court of Iowa considered the statute and held "that an illegal drug test cannot provide a basis to render an employee ineligible for unemployment compensation benefits." Thereafter, in Harrison v. Employment Appeal Board, 659 N.W.2d 581 (Iowa 2003), the Iowa Supreme Court held that where an employer had not complied with the statutory requirements for the drug test, the test could not serve as a basis for disqualifying a claimant for benefits. In Sims v. NCI Holding Corp., 759 N.W. 2d 333, 338 (Iowa 2009), the court held that substantial compliance with the statute was required before a drug test request or drug test may serve as a basis for disqualifying an employee for unemployment insurance benefits.

The evidence in this case established that the employer fully complied with the provisions of Iowa code Section 730.5(8). The drug test given to the claimant was a legal drug test and showed that the claimant had used marijuana. The claimant admitted that she used marijuana at a party. The employer's written policy, of which the claimant was aware, states that a positive drug test results in termination on the first offense. This is permitted under Iowa law. The claimant may have made a poor choice to use marijuana and she may not be a habitual drug user. The law recognizes, however, that employers have a right to require a drug- and alcohol-free workplace for the safety of all workers, including the claimant. A failed drug test is grounds for termination and disqualification from receiving unemployment insurance benefits when the employer complies with Section 730.5(8). The employer has done so. Benefits are denied.

DECISION:

The representative's decision dated November 2, 2011, reference 01, is affirmed. Unemployment insurance benefits shall be withheld until the claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/kjw