

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JAIME NIEVES
Claimant

APPEAL NO: 12A-UI-08064-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

ABM JANITORIAL SERVICES NORTH
Employer

OC: 05-27-12
Claimant: Respondent (1)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the June 27, 2012, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on July 25, 2012. The claimant did not respond to the hearing notice and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. Patty Lee, District Manager and Sandy Linsin, Employer Representative, participated in the hearing on behalf of the employer. Employer's Exhibits One through Four were admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a part-time janitorial worker for ABM Janitorial Services North from December 29, 2010 to February 5, 2012. The employer was losing a cleaning contract with GMAC Mortgage Company effective February 7, 2012. Consequently, it tried to place its employees with other contracts. It offered the claimant a position at a John Deere facility, which requires all employees to submit to a pre-employment drug screen. On January 31, 2012, the claimant reported to Allen Occupational Health for his drug test. The clinic is sanitary and offers privacy to clients during the testing procedure. The claimant's urine sample was split at the time of collection. The claimant was allowed to provide information that might affect the test results but the employer is unsure of whether he was notified of the drugs he would be tested for. Allen Occupational Health sent the claimant's specimen to a certified laboratory in Memphis, Tennessee. The claimant tested positive for marijuana. The test results were verified by a medical review officer February 3, 2012, and the medical review officer notified the claimant of the test results. On February 5, 2012, the claimant reported for work and was informed his employment was terminated for a positive drug screen. The employer did not send the claimant a certified letter, return receipt requested, of the results of the test and his right to request and obtain a confirmatory test of the secondary sample at a lab or his choosing within seven days from the mailing date of the notice.

While the claimant was allowed benefits in the representative's decision dated June 27, 2012, but has not claimed or received benefits since his separation from this 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.

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 of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Iowa Code § 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, 606 N.W.2d 553 (Iowa 1999), the Supreme Court of Iowa considered the statute and held "that an illegal drug test cannot provide the 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 requirement for the drug test, the test could not serve as a basis for disqualifying a claimant for benefits. In the present case, the employer failed to comply with Iowa Code § 730.5. Accordingly, the drug test was not authorized by law and cannot serve as the basis to disqualify the claimant from unemployment insurance benefits.

The evidence in the record clearly establishes that the claimant was not informed by certified mail, return receipt requested, of the test results and the right to be retested to obtain a confirmatory test of the secondary sample under the appropriations of section 730.5(7)(i)(1) and (2), which require that if a confirmed positive test result is received by the employer, the employer must notify the employee by certified mail, return receipt requested, of the results of the test and the right to be retested and to obtain a confirmatory test of the secondary sample. The employee must be informed that he may choose a certified lab of his own choosing, that the fee, while payable by the employee, be comparable in cost to the employer's initial test, and that the employee has seven days from the date of mailing to assert his right and request to be retested. The employer's "substantial compliance" with the requirements of the law in this case is not sufficient.

The Supreme Court of Iowa in the case of Jerrie Laverne Sims v. NCI Holding Corporation, et. al, No. 07-1468, Filed January 9, 2009, held that strict compliance with the notice provision of section 730.5, the Drug Free Workplace Statute, is required. The court held that the notice requirement within the statute focuses more directly on the protection of employees who are required to submit to drug testing and that section 730.5(7)(i)(1) accomplishes the protective purpose of the statute by mandating written notice by certified mail of (1) any positive drug test, (2) the employee's right to obtain a confirmatory test, and (3) the fee paid by the employee to the employer for reimbursement of the expense of that test. The court held that such a formal notice conveys to the addressee "a message that the contents of the document are important and worthy of the employee's deliberate reflection." In deciding whether a substantial compliance has taken place, the court cited Harrison v. Employment Appeal Board, 659 N.W.2d 581, 586 (Iowa 2003) in stating "although an employer is entitled to have a drug free workplace, it would be contrary to the spirit of Iowa's drug testing law if we were to allow employers to ignore the protections afforded by this statute..."

The court concluded that the verbal notice provided by NCI at the time of Sims' termination regarding the right to have the testing of the sample was insufficient to convey to Sims all of the employee protections afforded by section 730.5(7). The court held that although Sims was verbally informed of the right to undertake a confirmatory test, the verbal notice was incomplete and failed to adequately convey the message that the notice was important. It was noted that a written notice sent by certified mail conveys the importance of the message and the need for deliberate reflection. The court further held that NCI did not come into substantial compliance with the statutory obligation under section 730.5(7) when it sent a written notice to Sims several months after he was discharged. The court concluded that verbal notice provided at that time of termination was insufficient to convey to Sims all of the employee protections afforded by section 730.5(7). It held that although the verbal notice informed the employee of his right to take a confirmatory test, the verbal notice was incomplete and did not adequately convey the message the notice was important.

In view of the strict position taken by the Iowa Supreme Court in the Sims case, the administrative law judge concludes that the employer in this case did not establish strict compliance with section 730.5 of the Drug Free Workplace Statute. Because the employer's notice to the claimant of the positive test did not comply with Iowa Code § 730.5, the test was not authorized by law and cannot serve as the basis for disqualifying the claimant from unemployment insurance benefits. Based upon the evidence in the record and the application of the appropriate law, the administrative law judge must conclude that the claimant was discharged for no disqualifying reason. Accordingly, the claimant is eligible for benefits.

DECISION:

The June 27, 2012, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/css