

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

STEVEN GILCHRIST
Claimant

APPEAL NO: 10A-UI-17565-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

CINTAS CORPORATION NO 2
Employer

OC: 12-20-10
Claimant: Respondent (1)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the December 20, 2010, reference 04, decision that allowed benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on March 8, 2011. The claimant participated in the hearing. Nikki DeYoung, General Manager and Devon Lutgens, Human Resource Manager, participated in the hearing on behalf of the employer. Employer's Exhibits One through Five 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 full-time unloader for Cintas Corporation from November 18, 2009 to October 7, 2010. On Friday, October 1, 2010, the claimant reported for work and went to the restroom to change his clothes. After he left the service manager went in to use the restroom and found the claimant's wallet and a marijuana pipe. The service manager took the wallet and pipe to General Manager Nikki DeYoung and she called human resources for direction. Human Resources did not get back to her until Monday, October 4, 2010, at which time she was instructed to call the police to pick up the pipe and to schedule a meeting with the claimant. During that meeting Ms. DeYoung returned the claimant's wallet and asked him if the pipe belonged to him. He stated it was not his pipe but he found it while unloading a van of approximately 30 to 40 uniforms October 1, 2010. Ms. DeYoung explained that the pipe gave the employer reasonable suspicion to send the claimant for a drug screen. A supervisor drove the claimant to Concentra lab in Davenport. The employer gave the claimant a drug test request which he provided to the Concentra receptionist. He gave his personal identification to the nurse and after a delay while the claimant drank water so he could provide a urine sample he was taken to the restroom and told to empty his pockets and not to turn on the water faucet while in the restroom. The nurse took the sample, split it and labeled both samples. The claimant was suspended until the test results were known. The medical review officer called the claimant and said he tested positive for marijuana and THC and asked him if was taking any

medication that might result in a positive test. The only medication the claimant was taking would not have caused a positive test for marijuana. Neither the medical review officer nor the employer sent the claimant a certified letter return receipt requested with the test results and notifying the claimant he had the right to a confirmatory test at his own expense at a lab of his own choosing within seven days of the date of mailing. The employer met with the claimant October 7, 2010, and terminated his employment for violation of its written drug testing policy. The claimant testified he had not smoked marijuana and that when he found the pipe October 1, 2010, he did not inform his supervisor because she was busy and he held on to it over the weekend and brought it back to work October 4, 2010, because he thought someone violated the employer's drug policy. He previously found another pipe in a vehicle he was unloading and reported it to his supervisor who simply threw it away.

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). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of

unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000). The administrative law judge did not find the claimant's explanation of how he came to possess the marijuana pipe or that he held on to it October 1, 2010 through October 4, 2010, so he could report it to the employer to be credible. He stated the truck the pipe came from contained uniforms from 30 to 40 people that did not work for the employer but he wanted to report it because someone violated a drug policy. It is not reasonable to believe the pipe could be connected to an individual when all he had was 30 to 40 uniforms and did not know which one the pipe came from. Additionally, if the claimant was truly concerned he would have interrupted his supervisor October 1, 2010, to inform her of the situation but did not do so. That said, however, 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 has 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 the present case, the employer had reasonable cause to request a drug test based upon finding the marijuana pipe with the claimant's wallet in the restroom, but 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 receiving 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 re-tested 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 re-tested 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 re-tested.

Because the employer 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 receiving unemployment insurance benefits. Consequently, the administrative law judge must conclude the claimant was discharged for no disqualifying reason. Therefore, benefits are allowed.

DECISION:

The December 20, 2010, reference 04, 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/pjs