

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**AMBER M DENNISON**  
Claimant

**CAPTIVE PLASTICS LLC**  
Employer

**APPEAL 17A-UI-04502-JP-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 04/02/17**  
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the April 24, 2017, reference 01, unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on May 18, 2017. Claimant participated. Employer did not register a witness for the hearing and did not have a witness testify at the hearing, but did provide documents to the Appeals Bureau prior to the hearing. The employer's documents were marked as Employer's Exhibit . Employer Exhibit 1 was admitted into evidence with no 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: Claimant was employed full-time as a packer from October 2, 2015, and was separated from employment on March 31, 2017, when she was discharged.

On March 31, 2017, the employer discharged claimant due to a positive drug test. Claimant did receive a copy of employer's drug and alcohol use policy. Employer's Exhibit 1. Approximately three or four days before March 31, 2017, the employer called claimant into the office during her shift. The employer told claimant she was going to have to take a random drug test. No evidence was presented on how claimant was randomly selected to take the drug test. Claimant had to take the test immediately at the employer. The employer had someone from a third party company administer the test. Claimant is not sure what third party company administered the test, but believes it is certified. Claimant provided a urine sample for the drug test. Claimant was told that the test was for drugs and alcohol, but she was not told what specific drugs were being tested for. The third party company employee split claimant's sample into two separate components. No evidence was presented as to the amount of urine in each component. Claimant believes the third party company tested the sample at the third party company's office.

On March 31, 2017, a medical review officer (MRO) from the third party company called the employer about claimant's test results. The employer brought claimant into the office and had her speak to the MRO. The MRO asked claimant if she was on any prescription medication or had been hospitalized recently. Claimant told the MRO that she was not on any prescription medication. The MRO told claimant that the test was positive. Claimant told the MRO that she had taken a pain pill from a previous prescription, but that she did not have the prescription bottle anymore. Claimant had taken the pain pill approximately two days before she took the test because her back was hurting. Claimant testified this pain pill was the last one she had and after claimant took the pain pill, she threw the prescription bottle away. The MRO told claimant she could talk to the employer about possibly going to rehabilitation. The MRO told claimant she could have the second sample tested, but she declined. The MRO told claimant that she would have to pay for the second test, but did not explain that if the second test did not confirm the results of the initial test, the employer would reimburse her for the costs. Claimant believes her positive test result violated the employer's policy. Claimant does not believe she was under the influence of a prescription drug when she took the test. Claimant asked the employer what was going to happen next. Human resource manager Sara Miller told claimant that she thought claimant would be discharged. The employer then discharged claimant. When claimant left on March 31, 2017, Ms. Miller was unclear if there was another option, and told claimant that she would contact claimant on April 3, 2017. Claimant was not given an option for rehabilitation. Claimant did not tell Ms. Miller that she had taken someone else's prescription medication. The results of the drug test were not provided to claimant by certified mail with return receipt requested.

#### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

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.

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). Whether an employee violated an employer's policies is a different issue from whether the employee is disqualified for misconduct for purposes of unemployment insurance benefits. See *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000) ("Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits." (Quoting *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993))). Iowa Code § 730.5(9) requires that a written drug screen policy be provided to every employee subject to testing. Testing under Iowa Code section 730.5(4) allows employers to test employees for drugs and/or alcohol but requires the employer "adhere to the requirements . . . concerning the conduct of such testing and the use and disposition of the results." Iowa Code § 730.5 allows drug testing of an employee upon "reasonable suspicion" that an employee's faculties are impaired on the job or on an unannounced random basis. Testing shall include confirmation of initial positive test results. Iowa Code § 730.5(7)(i)(1) mandates that an employer, upon a confirmed positive drug or alcohol test by a certified laboratory, notify the employee of the test results by certified mail return receipt requested, and the right to obtain a confirmatory or split-sample test before taking disciplinary action against an employee.

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

While the employer certainly may have been within its rights to test and fire claimant, it failed to provide her a sufficient notice of the test results and an opportunity for a split sample test according to the strict and explicit statutory requirements. Although the MRO informed claimant about the test results and her opportunity to have the second sample tested at her costs, no evidence was presented that the employer notified claimant in writing by certified mail return receipt requested about the test results and her rights concerning testing of the second sample. Furthermore, the employer failed to inform claimant prior to her decision to decline having the second sample tested that "[i]f the results of the second test do not confirm the results of the initial confirmatory test, *the employer shall reimburse the employee* for the fee paid by the employee for the second test[.]" Iowa Code § 730.5(7)(i)(1) (emphasis added). Therefore, the employer failed to comply with the strict statutory requirements of Iowa Code § 730.5. 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). Thus, the employer cannot use the results of the drug screen as a basis for disqualification from benefits. Benefits are allowed.

**DECISION:**

The April 24, 2017, reference 01, unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Jeremy Peterson  
Administrative Law Judge

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Decision Dated and Mailed

jp/rvs