

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

SURFUN J BOENS

Claimant

QPS EMPLOYMENT GROUP INC

Employer

APPEAL 18A-UI-06651-DL-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 05/20/18

Claimant: Appellant (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 730.5 – Private Sector Drug-free Workplaces

STATEMENT OF THE CASE:

The claimant filed an appeal from the June 14, 2018, (reference 01), unemployment insurance decision that denied benefits based upon a discharge from employment. After due notice was issued, a telephone conference hearing was held on July 3, 2018. Claimant participated. Employer participated through unemployment insurance specialist and onsite manager Jason Sheldahl.

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 assigned as a mounter at Titan Tire beginning November 13, 2017. The separation date was May 18, 2018, when both the assignment and the employment ended. His last day of work was May 2, 2018.

Claimant did receive a copy of employer's drug and alcohol use policy. Claimant submitted to a post-accident drug screen at a certified laboratory on May 2, 2018. The result on May 8 had an abnormal ph and the result was inconclusive so the medical review officer (MRO) suggested an observed re-collection of a specimen. Claimant submitted to a second test and provided a new sample at a certified laboratory on May 9, 2018. That result, on May 17, 2018, was positive for cocaine. The results were provided to claimant by the MRO via telephone on May 17, 2018. Sheldahl also relayed the test result information to claimant. The MRO explained the availability or a split sample test and explained how to obtain that. Upon hearing it would cost about \$150.00, claimant verbally declined. The employer sent a discharge letter by certified mail, of which claimant denied receipt, as he did regarding receipt of the employer's proposed exhibit.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

Iowa Code section 96.5(2)a provides:

Causes for disqualification.

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. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); accord *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000).

The employer has the burden of proving disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). 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 section 730.5(1)*i* 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. It also allows testing as condition of continued employment or hiring. Iowa Code § 730.5(4). Testing shall include confirmation of initial positive test results. If an oral fluid sample is taken and results are received in the presence of the employee, this is considered a sufficient sample for split sample testing. Iowa Code § 730.5(7)*f*. Iowa Code section 730.5(7)(i)(1) mandates that if a medical review officer (MRO) reports a positive test result to the employer, as opposed to the employee, 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. Iowa Code section 730.5(9) requires that a written drug screen policy be provided to every employee subject to testing.

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). However, the Court in *Sims v. HCI Holding Corp.*, 759 N.W.2d 333 (Iowa 2009), held that “[u]pon receipt of the positive test result evidencing employee’s violation of the written drug policy, NCI was authorized to terminate the employment. Iowa Code § 730.5(10)(a)(3). He was given verbal but not written notice of the split-sample testing opportunity. In that case, Sims eventually requested a confirmatory retest, which confirmed the initial positive result, so the Court held that Sims’s employment was not adversely affected by an erroneous test result” when addressing the lack of substantial compliance because of verbal notification of split-sample test opportunity, verbal declination and written notice provided several months later.

The employer has met the requirements of Iowa Code section 730.5. The claimant did receive a copy of employer’s drug and alcohol use policy, he was tested at a certified testing facility post-accident, the drug screen was positive for cocaine, the MRO notified claimant of the test results and offered a split-screen sample, and claimant declined a second test of the split sample. Employees are required to be drug free in the workplace. The violation of the known work rule and DOT regulations constitutes misconduct as it presents a safety hazard to the employee and the general public and potential liability for the employer.

DECISION:

The June 14, 2018, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/rvs