

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**BRIAN ANDERSON**

Claimant

**APPEAL NO: 14A-UI-01353-BT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**ASPLUNDH TREE EXPERT CO**

Employer

**OC: 12/08/13**

**Claimant: Appellant (1)**

Iowa Code § 96.5-2-a - Discharge for Misconduct

**STATEMENT OF THE CASE:**

Brian Anderson (claimant) appealed an unemployment insurance decision dated January 28, 2014, reference 03, which held that he was not eligible for unemployment insurance benefits because he was discharged from Asplundh Tree Expert Company (employer) for work-connected misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on February 27, 2014. The claimant participated in the hearing. The employer participated through Tim Woltering, General Foreman. Employer's Exhibits One through Five were admitted into evidence.

**ISSUE:**

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

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was employed as a full-time foreman of the tree lift crew from January 3, 2000, through December 10, 2013, when he was discharged for violation of the employer's substance abuse policy. The employer's written policy confirms it does not tolerate or condone substance abuse and that employees who engage in the use of illegal drugs are subject to disciplinary action up to termination. The claimant was involved in a motor vehicle accident on December 2, 2013, and was taken for a non-DOT drug test within two hours of the accident. He was tested for drugs at the Occupational Health center in Ames, Iowa and the urine sample was split into two specimens. The claimant was taken off work on that date.

Medical Review Officer Dr. Stephen Kracht notified the claimant he tested positive for marijuana. The employer was given notification of the same result on December 9, 2013. General Foreman Tim Woltering personally took the claimant's written Notification of Rights to the claimant's residence on December 10, 2013, and discussed it with him. The written documentation advised the claimant of his right to have a confirmatory test of the split sample and he admitted in the hearing that he was aware of this but elected not to have the split sample tested. When questioned during the hearing as to whether he had used marijuana, he replied, "Obviously I had!"

The employer's substance abuse policy states that, "Appropriate action to be taken as a result of the positive drug test will be left up to the judgment of the Company's Management. Should the employee be referred to an SAP, the employee must contact the SAP within 72 hours of said referral to commence treatment. Failure to report to the SAP within 72 hours shall result in the immediate termination of the employee and his or her becoming ineligible for rehire by the Company or any of its subsidiaries." Mr. Woltering talked with the claimant about a drug treatment program but the claimant said he was financially burdened and did not have the money to do that. He argues that he should have had 72 hours to make that decision but when he called the employer a day or two later, he was eventually advised his employment was terminated. There is no evidence that the claimant had been referred to an SAP. The only other 72-hour time period mentioned in the written drug policy addresses an employee's right to have the split specimen tested, which the claimant confirmed he chose not to have done.

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

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged him for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. It is the employer's burden to prove the discharged employee is disqualified for benefits for misconduct. *Sallis v. Employment Appeal Bd.*, 437 N.W.2d 895, 896 (Iowa 1989).

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 duties and obligations to the employer. See 871 IAC 24.32(1). The claimant was discharged for violation of the employer's substance abuse policy due to his positive drug test for marijuana. In the unemployment appeal hearing, the claimant admitted he had used marijuana.

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. The statute requires the employer to notify the claimant by certified mail, return receipt requested of the positive result and his right to obtain a confirmatory test of the secondary sample. Iowa Code § 730.5(7)(i)(1) and (2). The claimant argues he should not be disqualified for benefits because he did not receive notification by mail. However, he received notification in person and he admits he was fully aware of his right to obtain a confirmatory test.

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. However, 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 Iowa Supreme Court noted that while the statute permits an employer to conduct drug tests, it also mandates protection that must be afforded to employees. *Id.* The court has particularly focused on the notice requirements of the statute. In the case herein, the claimant had actual notice of his rights. The employer has substantially complied with the requirements of Iowa Code § 730.5. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

**DECISION:**

The unemployment insurance decision dated January 28, 2014, reference 03, is affirmed. The claimant is not eligible to receive unemployment insurance benefits because he was discharged from work for misconduct. Benefits are withheld until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

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Susan D. Ackerman  
Administrative Law Judge

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Decision Dated and Mailed

sda/pjs