

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**SKYLER S AKERS**  
Claimant

**MODERN PIPING INC**  
Employer

**APPEAL 16A-UI-09177-JP-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 07/31/16**  
**Claimant: Respondent (1)**

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Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment  
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

**STATEMENT OF THE CASE:**

The employer filed an appeal from the August 17, 2016, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on September 9, 2016. Claimant did not participate. Employer participated through general manager Dan Wille. Human resources Sara Tack attended the hearing on behalf of the employer. Official notice was taken of the administrative record of claimant's benefit payment records, with no objection.

**ISSUES:**

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can charges to the employer's account be waived?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a probationary apprentice for the HVAC division from January 28, 2016, and was separated from employment on August 1, 2016, when he was discharged.

The employer has a written drug and alcohol policy. Claimant received a copy of employer's drug and alcohol policy. The policy provides for uniform standards for actions that are taken in case of a confirmed positive test/or refusal to submit to testing. If an employee refuses to take a test, they are immediately discharged. The employer has an awareness program to inform employees of the dangers of drug and alcohol use in the workplace. The employer provides training to supervisory personnel regarding drug and alcohol abuse. The employer's policy does provide for random testing of its employees. The policy provides that all employees are in

the same pool and are randomly selected by a third party. Each employee has an equal chance of selection.

When claimant came to work for the employer in January 2016, the employer told him he had to pass a drug test to be employed. Claimant told the employer he could not pass the drug test at that time. The employer wanted to help claimant out, so they stated they would test him in thirty days and then randomly test him over the next six months.

Claimant was tested approximately thirty days after he was hired and he passed the test. On August 1, 2016, the employer decided to randomly test claimant. August 1, 2016 was still within six months of claimant's hire date. Claimant was not randomly selected from a pool of employees, but was chosen pursuant to the agreement at the time of hire that he could be randomly tested for six months after he was hired. Claimant's supervisor told claimant that after safety meeting he needed to go be drug tested. The drug screen was going to occur at the employer's place of business. Claimant told his supervisor that he was not going to pass the test and he was not going to take the test. Claimant stated he had smoked marijuana and refused to take the test. The employer told claimant that according to the policy he would be discharged for refusing to take the test. The employer then discharged claimant.

#### **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. Benefits are allowed.

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.

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.

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). The employer discharged claimant after he refused to submit to a random drug test on August 1, 2016. Thus, the issue is whether the random drug test the employer requested was authorized under Iowa law.

Iowa law is very specific about what an employer shall, may or cannot do when creating a private sector drug-free workplace. See Iowa Code § 730.5. Iowa Code § 730.5(9)(a)(1) states:

Drug or alcohol testing or retesting by an employer *shall* be carried out within the terms of a written policy which has been provided to every employee subject to testing, and is available for review by employees and prospective employees.  
(emphasis added)

The employer has a drug and alcohol testing policy that provides for random testing where all employees are in the same pool and are randomly selected by a third party. Iowa Code § 730.5(8) provides the circumstances under which employers may conduct drug tests. Iowa Code § 730.5(8) states:

*Drug or alcohol testing.* Employers may conduct drug or alcohol testing as provided in this subsection:

a. Employers may conduct unannounced drug or alcohol testing of employees who are selected from any of the following pools of employees:

(1) The entire employee population at a particular work site of the employer except for employees not subject to testing pursuant to a collective bargaining agreement, or employees who are not scheduled to be at work at the time the testing is conducted because of the status of the employees or who have been excused from work pursuant to the employer's work policy prior to the time the testing is announced to employees.

(2) The entire full-time active employee population at a particular work site except for employees not subject to testing pursuant to a collective bargaining agreement, or employees who are not scheduled to be at work at the time the testing is to be conducted because of the status of the employee or who have been excused from work pursuant to the employer's working policy.

(3) All employees at a particular work site who are in a pool of employees in a safety-sensitive position and who are scheduled to be at work at the time testing is conducted, other than employees not subject to testing pursuant to a collective bargaining agreement, or employees who are not scheduled to be at work at the time the testing is to be conducted or who have been excused from work pursuant to the employer's work policy prior to the time the testing is announced to employees.

- b. Employers may conduct drug or alcohol testing of employees during, and after completion of, drug or alcohol rehabilitation.
- c. Employers may conduct reasonable suspicion drug or alcohol testing.
- d. Employers may conduct drug or alcohol testing of prospective employees.
- e. Employers may conduct drug or alcohol testing as required by federal law or regulation or by law enforcement.
- f. Employers may conduct drug or alcohol testing in investigating accidents in the workplace in which the accident resulted in an injury to a person for which injury, if suffered by an employee, a record or report could be required under chapter 88, or resulted in damage to property, including to equipment, in an amount reasonably estimated at the time of the accident to exceed one thousand dollars.

Iowa Code § 730.5(1)(l) defines “Unannounced drug or alcohol testing” as:

testing for the purposes of detecting drugs or alcohol which is conducted on a periodic basis, without advance notice of the test to employees, other than employees whose duties include responsibility for administration of the employer’s drug or alcohol testing program, subject to testing prior to the day of testing, and without individualized suspicion. The selection of employees to be tested from the pool of employees subject to testing shall be done based on a neutral and objective selection process by an entity independent from the employer and shall be made by a computer-based random number generator that is matched with employees’ social security numbers, payroll identification numbers, or other comparable identifying numbers in which each member of the employee population subject to testing has an equal chance of selection for initial testing, regardless of whether the employee has been selected or tested previously. The random selection process shall be conducted through a computer program that records each selection attempt by date, time, and employee number.

On August 1, 2016, the employer decided to have claimant randomly tested. Claimant was not selected from a pool of employees; instead he was only selected because of the agreement from when he was hired. When claimant was informed about the random drug test, he refused to submit to the drug test. Claimant admitted he had smoked marijuana and would not pass the drug test.

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). While the employer certainly may have been within its rights to discharge claimant, it failed to follow the strict and explicit statutory requirements in conducting random tests. The employer did not place claimant in a pool of employees and he was not selected by a third party to be tested as required by Iowa Code § 730.5. Thus, the employer cannot use claimant’s refusal to submit to the drug screen or his subsequent admission to smoking marijuana as a basis for disqualification from benefits.

As benefits are allowed, the issues of overpayment, repayment, and the chargeability of the employer’s account are moot.

**DECISION:**

The August 17, 2016, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

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Jeremy Peterson  
Administrative Law Judge

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Decision Dated and Mailed

jp/pjs

**NOTE TO EMPLOYER:**

If you wish to change the address of record, please access your account at:

<https://www.myiowaui.org/UITIPTaxWeb/>.

Helpful information about using this site may be found at:

<http://www.iowaworkforce.org/ui/uiemployers.htm> and

<http://www.youtube.com/watch?v=mpCM8FGQoY>