IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JAMMIE P KELLER
Claimant

SUNOPTA INGREDIENTS INC
Employer

APPEAL NO: 13A-UI-03439-ET

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/17/13
Claimant: Appellant (1)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the March 12, 2013, reference 01, decision that denied benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on April 24, 2013. The claimant participated in the hearing. Jacob Thiltgen, Acting Plant Manager and Gary Netolicki, Production Manager, participated in the hearing on behalf of the employer.

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 utility worker for Sunopta Ingredients, Inc. from October 19, 2010 to February 13, 2013. On February 12, 2013, two management employees reported the claimant was exhibiting confused speech patterns, swaying, taking staggered steps, angry, his work patterns were "tired and overly extensive," and he showed confusion and some paranoia when approached. The employer had safety concerns because the claimant was operating a fork lift. The employer asked the managers to complete reasonable cause forms and they did so and returned the documents to the employer. Production manager Gary Netolicki and acting plant manager Jacob Thiltgen spoke to the witnesses and Mr. Netolicki then went to get the claimant. The claimant was allowed to go to his locker alone and was gone for about five minutes before returning at which time Mr. Netolicki took him to the Work Well Clinic in Cedar Rapids to submit to a drug screen. The claimant went in to give his sample around 3:00 p.m. Soon after the claimant went back into the rest room a nurse called Mr. Netolicki over and stated the claimant's sample was 84 degrees. The nurse said that due to the temperature of the urine it could not possibly have come from the claimant. The sample has to be between 90 and 100 degrees to be considered acceptable and tested by the clinic. The nurse told the claimant and Mr. Netolicki he had to supply a second sample within three hours. The claimant was encouraged to drink water and was allowed to consume five, eight ounce glasses of water

in that time frame. At the end of the three hours, right before the clinic closed, the claimant was asked to produce another urine sample with a male technician or nurse present to watch him in order to make sure he did not tamper with the test. He went to the back of the clinic again but came back out stating to Mr. Netolicki, "I can't fucking pee because that guy is standing behind me and my dick shriveled up." The nurse told Mr. Netolicki the claimant's sample was not valid and she was not going to send it to the lab. The claimant was upset and Mr. Netolicki called Mr. Thiltgen who called a taxi to take the claimant home. Mr. Netolicki told the claimant a cab was coming but the claimant contacted someone he knew to pick him up and take him to the employer's premises to pick up his truck without notifying Mr. Netolicki he was leaving. He then drove himself home. Before the claimant left Mr. Netolicki told the claimant he needed to be at the plant at 10:00 a.m. the following day and he was not sure what action the employer was going to take. On February 13, 2013, Mr. Thiltgen notified the claimant his employment was being terminated because his urine sample had been tampered with and could not be tested, which resulted in automatic termination, and also because he failed to follow the employer's directions as he left the clinic without his manager's consent.

Approximately one year ago the claimant tested positive for marijuana after a random drug screen and was placed on the employer's probationary program. He had to undergo a substance abuse evaluation and submit to random drug tests once every month for the following 12 months. That was a one-time allowance made by the employer's policy for an employee who tests positive for an illegal substance.

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:

> 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 claimant was behaving in an erratic manner at work as observed by two trained management employees and consequently was subject to reasonable suspicion drug testing February 12, 2013. Additionally, he had tested positive for marijuana in the past year and consequently was subject to random testing. The employer followed Iowa Code section 730.5 in having the test conducted but the clinic personnel notified the employer the test was tampered with because the temperature of the sample was only 84 degrees and must be between 90 and 100 degrees to be considered a valid sample. The claimant was then asked to undergo a second test and was allowed three hours and five, eight ounce glasses of water before trying to provide another sample but was unable to do so because the clinic had a witness present to prevent the claimant from tampering with the test again. Urine testing must be done under private and sanitary conditions unless there is a "reasonable suspicion that a particular individual subject to testing may alter or substitute the urine specimen to be provided or has previously altered or substituted a urine specimen provided pursuant to a drug or alcohol test." Iowa Code section 730.7-a. While the claimant denies tampering with the sample or ingesting any substance that would result in a positive test, he had five minutes alone at his locker before Mr. Netolicki took him to the clinic. Under these circumstances, the only conclusion to be drawn is that the claimant tampered with his urine sample causing a temperature modification that resulted in the sample being deemed unfit for testing, which is considered a positive test. Consequently, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits are denied.

DECISION:

The March 12, 2013, reference 01, decision is affirmed. The 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.

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Julie Elder
Administrative Law Judge

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Decision Dated and Mailed

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