IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CHRISTINA FUSARO-RYE
Claimant

AEROTEK INC
Employer

APPEAL NO: 13A-UI-01165-ET

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/06/13
Claimant: Appellant (2)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the January 28, 2013, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on April 5, 2013. The claimant participated in the hearing with Attorney Gary Mattson. Alexandra Cannistra, Customer Support Associate; Ellen Carlson, Account Recruiting Manager; and Ali Holland, Account Manager, participated in the hearing on behalf of the employer. Employer's Exhibits One and Two were admitted into evidence.

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 loan servicing specialist II for Aerotek last assigned to Wells Fargo from April 12, 2012 to November 2, 2012. On October 22, 2012, the claimant was leaving work around 1:00 or 2:00 p.m. and took the shuttle bus to the parking lot the client and employer recommends employees use due to the heavy vehicle traffic on the street that needs to be crossed to reach the employee parking area. She got on the bus and the driver thought a truck was going to rear end her so before the claimant could sit down the driver accelerated quickly to avoid being hit from behind. That action caused the claimant to fall. She went home and called the employer to report the incident. On October 23, 2012, she spoke to account recruiting manager Ellen Carlson about the accident and told her she was going to see her own doctor that day. Ms. Carlson also set up an appointment for the claimant to see its doctor after completing the required paperwork. The employer does not contract with Keck, the shuttle bus company, but decided to open a worker's compensation file in case it was determined it had any liability.

When the claimant saw her physician October 23, 2012, she was told she had a concussion and whiplash injuries. After a cat scan she was prescribed muscle relaxers and pain medication. On October 25, 2012, the employer worker's compensation carrier called the claimant and later Ms. Carlson called the claimant and stated the claimant needed to take a drug test that day.

The claimant refused because it was raining and she was taking pain medication but agreed to go October 26, 2012. On that date the claimant's sister took her to see the employer's worker's compensation doctor at Occupational Medicine who performed drug and alcohol screens on her.

The conditions at Occupational Medicine were private and sanitary. The employer does not know if the medical employees split the sample at the time of collection and neither did the claimant. The medical personnel did inform the claimant of the drugs she would be tested for but did not give her an opportunity before or after the test to inform them of any substance, over the counter or legally prescribed, that could affect the outcome of her drug screen. The only information the claimant had when leaving Occupational Medicine was that she passed the alcohol portion of the test. The claimant then went to the employer's premises and told Ms. Carlson she felt she failed the drug test as she believed she would test positive for marijuana.

On October 31, 2012, a medical review officer called the claimant and notified her she did test positive for marijuana. He told the claimant the test could be redone but it would be very expensive. On November 2, 2012, Ms. Carlson met with the claimant and told her due to the positive test her employment was terminated and she needed to pack her desk and tell her supervisor she had to leave. She instructed the claimant to leave quietly and she did so. There was no further contact between the parties. The employer did not send the claimant a certified letter, return receipt requested, stating she tested positive for marijuana, had the right to a confirmatory test of the split sample at a certified laboratory of her choosing and the cost of the test, borne by the claimant, could not exceed that charged to the employer.

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.

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.
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> 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 employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Misconduct must be substantial in order to justify denial of unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1990).

Iowa Code section 730.5 provides the authority under which a private sector employer doing business in Iowa may conduct drug or alcohol testing of employees. In Eaton v. Employment Appeal Board, 606 N.W.2d 553 (Iowa 1999), the Supreme Court of Iowa considered the statute and held "that an illegal drug test cannot provide the 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 requirement for the drug test, the test could not serve as a basis for disqualifying a claimant for benefits. In the present case, the employer requested the drug test based on the claimant's injuries on the shuttle bus but the employer failed to comply with Iowa Code section 730.5. Accordingly, the drug test was not authorized by law and cannot serve as the basis to disqualify the claimant from unemployment insurance benefits.

The evidence in the record clearly establishes that the claimant was not informed by certified mail, return receipt requested, of the test results and the right to be retested to obtain a confirmatory test of the secondary sample under the appropriations of section 730.5(7)(i)(1) and (2), which require that if a confirmed positive test result is received by the employer, the employer must notify the employee by certified mail, return receipt requested, of the results of the test and the right to be retested and to obtain a confirmatory test of the secondary sample. The employee must be informed that she may choose a certified lab of her own choosing, that the fee, while payable by the employee, be comparable in cost to the employer's initial test, and that the employee has seven days from the date of mailing to assert his right and request to be retested.

While the claimant in this case made an admission of marijuana use, the certified letter with return receipt requested providing the required information was still necessary as the employer's "substantial compliance" with the requirements of the law is not sufficient.

The Supreme Court of Iowa in the case of Jerrie Laverne Sims v. NCI Holding Corporation, et. al, No. 07-1468, Filed January 9, 2009, held that strict compliance with the notice provision of section 730.5, the Drug Free Workplace Statute, is required. The court held that the notice requirement within the statute focuses more directly on the protection of employees who are required to submit to drug testing and that section 730.5(7)(i)(1) accomplishes the protective purpose of the statute by mandating written notice by certified mail of (1) any positive drug test, (2) the employee's right to obtain a confirmatory test, and (3) the fee paid by the employee to the employer for reimbursement of the expense of that test. The court held that such a formal

notice conveys to the addressee "a message that the contents of the document are important and worthy of the employee's deliberate reflection." In deciding whether substantial compliance has taken place, the court cited Harrison v. Employment Appeal Board, 659 N.W.2d 581. 586 (Iowa 2003) in stating "although an employer is entitled to have a drug free workplace, it would be contrary to the spirit of Iowa's drug testing law if we were to allow employers to ignore the protections afforded by this statute…"

The court concluded that the verbal notice provided by NCI at the time of Sims' termination regarding the right to have the testing of the sample was insufficient to convey to Sims all of the employee protections afforded by section 730.5(7). The court held that although Sims was verbally informed of the right to undertake a confirmatory test, the verbal notice was incomplete and failed to adequately convey the message that the notice was important. It was noted that a written notice sent by certified mail conveys the importance of the message and the need for deliberate reflection. The court further held that NCI did not come into substantial compliance with the statutory obligation under section 730.5(7) when it sent a written notice to Sims several months after he was discharged. The court concluded that verbal notice provided at that time of termination was insufficient to convey to Sims all of the employee protections afforded by section 730.5(7). It held that although the verbal notice informed the employee of his right to take a confirmatory test, the verbal notice was incomplete and did not adequately convey the message the notice was important.

In view of the strict position taken by the Iowa Supreme Court in the Sims case, the administrative law judge concludes that the employer in this case did not establish strict nor substantial compliance with section 730.5 of the Drug Free Workplace Statute. The administrative law judge further concludes, based upon the strict interpretation placed on the requirements of the statute in the Sims case by the Iowa Supreme Court, that the claimant's verbal admissions made to the employer do not constitute a knowing waiver of her rights to exercise the provisions of the law that allow retesting, nor do they negatively affect the claimant's legal ability to assert her right to have her sample retested under the provisions of the Drug Free Workplace Statute.

Because the employer's notice to the claimant of the positive test did not comply with Iowa Code section 730.5, the test was not authorized by law and cannot serve as the basis for disqualifying the claimant from unemployment insurance benefits. Based upon the evidence in the record and the application of the appropriate law, the administrative law judge must conclude that the claimant was discharged for no disqualifying reason. Accordingly, benefits are allowed.

As a side note, there is also a question of whether the employer had the right to test the claimant at all given she was injured after she clocked out and when she was off the employer's property on a shuttle bus run by a company the employer did not contract with to transport employees across a busy downtown street. Because the employer failed to meet the standards required by Iowa law with regard to the certified letter, there is no need to reach that question at this time.

DECISION:

The January 28, 2013, reference 01, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Julie Elder
Administrative Law Judge

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Decision Dated and Mailed

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