

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

LAWRENCE M MCBRIDE
Claimant

QPS EMPLOYMENT GROUP INC
Employer

APPEAL 18A-UI-07854-NM-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 06/17/18
Claimant: Respondent (1)**

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 July 13, 2018, (reference 03) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on August 10, 2018. Claimant participated and testified. Employer participated through Hearing Representative Mai Lor and witness Tiffany Wilsey. Employer's Exhibits 1 through 4 were received into evidence. Official notice was taken of tracking information on the United States Postal Services website.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

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

Can any 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 began working for employer on June 21, 2016 and his most recent assignment began on May 22, 2018. Claimant last worked as a full-time molder at the employer's client, West Liberty Foods. Claimant was not required to have a commercial driver's license (CDL) for this position. Claimant was separated from his assignment and employment on June 14, 2018, when he was discharged.

On May 30, 2018, claimant was injured on the job. Per the employer's drug testing policy, claimant was required to take a post-accident drug test. (Exhibit 4). Claimant signed an acknowledgement of this policy upon his hire. On June 1, 2018, claimant was sent to a third party medical provider, Great River Business Health. Claimant believed he was going there to

be treated for his injury, but when he arrived, he was informed by the nurse that she was going to administer a drug test. Claimant filled out a questionnaire, which included any medications he was taking, and then provided a sample in the restroom. On June 12, 2018, the drug test came back positive for marijuana. (Exhibit 3).

On June 14, 2018, claimant was asked to come in for a meeting with the employer. Claimant was verbally informed of the test results during this meeting. A certified letter was prepared to send to the claimant the same day. (Exhibit 1). This letter informed claimant of the positive test result, of his right to have a confirmatory test performed, and that he was discharged from employment. Claimant acknowledged he was informed of the test result during the meeting, but testified he was not advised of his right for a confirmatory test, nor was he ever given a certified letter outlining the test results or his rights. The United States Postal Service's website contained no record of the tracking number provided by the employer for the certified letter.¹ The employer did not submit any additional evidence showing the letter was actually sent to the claimant.

The claimant filed a new claim for unemployment insurance benefits with an effective date of June 17, 2018. The claimant filed for and received a total of \$1,088.00 in unemployment insurance benefits for the weeks between June 17 and July 14, 2018. Both the employer and the claimant participated in a fact finding interview regarding the separation on July 12, 2018. The fact finder determined claimant qualified for benefits.

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.

- 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

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<https://tools.usps.com/go/TrackConfirmAction?tRef=fullpage&tLc=3&text28777=&tLabels=7017066000009973134%2C%2C> (last accessed August 10, 2018).

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 Department of Job Service*, 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). Whether an employee violated an employer's policies is a different issue from whether the employee is disqualified for misconduct for purposes of unemployment insurance benefits. See *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000) ("Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits." (Quoting *Reigelsberger*, 500 N.W.2d at 66.)).

In this case, claimant was discharged after testing positive for a controlled substance, marijuana, following a work-related injury. Iowa Code section 730.5(9) requires that a written drug screen policy be provided to every employee subject to testing. 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(7)(i)(1) mandates that if a medical review officer (MRO) reports a positive test result to the employer, upon a confirmed positive drug or alcohol test by a certified laboratory, the employer 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. 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).

Claimant testified, while he was verbally notified by the employer of the test results, he was never advised of his right to obtain a confirmatory test, nor was he provided with the certified letter outlining the test results and his rights. The employer was unable to provide any evidence to the contrary. While the employer certainly may have been within its rights to test and fire the claimant, it failed to provide claimant with an opportunity for a split sample test according to the strict and explicit statutory requirements. See, *Sims v. HCI Holding Corp.*, 759 N.W.2d 333 (Iowa 2009), where verbal and later written notice of a split sample test was provided to claimant, thus substantially complying with the statute. As the certified letter was never actually sent to the claimant, the employer cannot use the results of the drug screen as a basis for disqualification from benefits. As benefits are allowed, the issues of overpayment and participation are moot.

DECISION:

The July 13, 2018, (reference 03) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. The issues of overpayment and participation are moot.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/rvs