

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

PAMELA S FORD
Claimant

APPEAL NO. 11A-UI-01772-MT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MENARD INC
Employer

OC: 11/21/10
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated February 4, 2011, reference 02, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on March 15, 2011. Claimant participated personally. Employer participated by Paul Hammell, Store Counsel and Cassie McNamara, Human Resource Advisor and Jessica Flores, Human Resource Coordinator. Exhibits One through Eight and A were admitted into evidence.

ISSUE:

The issue in this matter is whether claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant last worked for employer on November 10, 2010.

Claimant was discharged on November 15, 2010 by employer because claimant tested positive for drugs on a random test November 15, 2010. Claimant failed the test for amphetamines. Claimant was given a second test that showed amphetamines again. The test was at random after claimant went through a self reported treatment program. Claimant was then sent a letter on January 25, 2011 informing her of the right to have the split sample tested at a laboratory of her choice and at her cost. The certified letter was sent over 45 days after the initial confirmatory test.

REASONING AND CONCLUSIONS OF LAW:

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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

871 IAC 24.32(4) provides:

(4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation.

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 Employment Appeal Board*, 602 N.W.2d 553, 557, 558 (Iowa 1999).

The last incident, which brought about the discharge fails to constitute misconduct because claimant was not sent notice of her rights by certified mail within 45 days of the confirmatory

test. The laboratory is only required to keep the split sample for 45 days. Iowa Code section 730.5(7)(b). This requirement is mandatory. There is no alternate allowed. In person notice of rights is not sufficient. The Iowa Courts have held that certified mail notice is mandatory. Harrison v. Employment Appeal Board, 659 NW2d 581 (IA 2003). The test was invalid due to the failure to follow Iowa law by sending notice of testing rights within a reasonable time, prior to the time the laboratory could have destroyed the split sample. The test is invalid as not in compliance with Iowa law. The administrative law judge holds that claimant was not discharged for an act of misconduct and, as such, is not disqualified for the receipt of unemployment insurance benefits.

In this matter, the evidence fails to establish that claimant was discharged for an act of misconduct when claimant violated employer's policy concerning drug use. Claimant was warned concerning this policy.

The last incident, which brought about the discharge, fails to constitute misconduct because the drug test is invalid as employer did not send the certified letter to claimant within a reasonable time and prior to the time the laboratory could destroy the split sample. The administrative law judge holds that claimant was not discharged for an act of misconduct and, as such, is not disqualified for the receipt of unemployment insurance benefits.

DECISION:

The decision of the representative dated February 4, 2011, reference 02, is reversed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

Marlon Mormann
Administrative Law Judge

Decision Dated and Mailed

mdm/css