

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

CARL R KIOUS
Claimant

J'S CUSTOM WORKS LLC
Employer

APPEAL 20A-UI-00937-SC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 01/05/20
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

On February 1, 2020, Carl R. Kious (claimant) filed an appeal from the January 24, 2020, reference 01, unemployment insurance decision that denied benefits based upon the determination J's Custom Works, LLC (employer) discharged him for violation of a known company policy. The parties were properly notified about the hearing. A telephone hearing was held on February 17, 2020 and consolidated with the hearings for appeals 20A-UI-01013-SC-T and 20A-UI-01014-SC-T. The claimant participated personally. The employer participated through Jeremiah Schacherer, CEO. The Employer's Exhibit 1 was admitted into the record.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a Glazer beginning on August 29, 2019, and was separated from employment on December 30, 2019, when he was discharged. The employer announced on November 27 that it would be instituting a drug testing policy prior to January 2020.

On December 16, the employer notified the employees of its new drug testing policy effective immediately. The employer also required all employees in a safety-sensitive position, which included the claimant, to submit to drug testing that day. The claimant reported for the drug test at the occupational clinic with whom the employer had contracted. A split sample was collected. The specimen was preliminarily positive and was sent for further testing.

The test came back positive for marijuana. The medical review officer (MRO) attempted to reach the claimant but was unsuccessful. On December 30, Jeremiah Schacherer, CEO, was notified of the claimant's positive test. He told the claimant that he was being terminated due to the positive test and wrote it in a letter. Schacherer did not mail the claimant a letter via certified letter notifying him of the right to have his split sample tested.

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, provided the claimant is otherwise eligible.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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). 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.)).

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). 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 also states, in relevant part:

1. Definitions. As used in this section, unless the context otherwise requires:

...

I. “Unannounced drug or alcohol testing” means 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 number 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 for tested previously.** The random selection process shall be conducted through a computer program that records each selection attempt by date, time, and employee number.

...

7. Testing procedures. All sample collection and testing for drugs or alcohol under this section shall be performed in accordance with the following conditions:

...

j. (1) If a confirmed positive test result for drugs or alcohol for a current employee is reported to the employer by the medical review officer, **the employer shall notify the employee in writing by certified mail, return receipt requested, of the results of the test, the employer’s right to request and obtain a confirmatory test of the second sample** collected pursuant to paragraph “b” at an approved laboratory of the employee’s choice, **and the fee payable by the employee to the employer for reimbursement of expenses concerning the test...**

...

8. 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**:

...

(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.

[Emphasis added.]

In this case, the employer was within its rights to fire the claimant; however, it has not established that it complied with the statutory requirements. The employer tested all employees on the day the policy was distributed. The employer is required to pick a random sample of employees to be selected. Merely testing all employee does not meet the randomness requirement under the definition of unannounced drug testing.

More importantly, the employer failed to notify the claimant of his right to test the split sample by mailing him a certified letter, return receipt requested. The employer notified the claimant verbally and in writing of the positive drug test but did not send the letter via certified mail or notify him of the right to have the split sample tested. The Iowa Supreme Court has held substantial compliance with the Iowa Code section 730.5 is acceptable. *Sims v. NCI Holding Corp.*, 759 N.W.2d 333 (2009). However, verbal notification of a positive test, even with notification of the right to a split sample test, is not substantial compliance with the code because "it is incomplete and fail[s] to adequately convey the message that the notice [is] important." *Id.* at 340. As the employer did not comply with the requirements of Iowa Code section 730.5, it cannot use the results of the drug screen as a basis for disqualification from benefits. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The January 24, 2020, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.



Stephanie R. Callahan
Administrative Law Judge

February 26, 2020
Decision Dated and Mailed

src/scn