IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

JENNIFER A SCHULTZ Claimant **AADG INC** Employer	**APPEAL 15A-UI-11457-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 09/20/15** **Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

The employer filed an appeal from the October 9, 2015 (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on October 28, 2015. Claimant participated. Employer participated through human resources manager Lanie Allen.

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: Claimant was employed full time as a production team member from June 6, 2015 and was separated from employment on August 31, 2015; when she was discharged.

Claimant was discharged after a positive drug screen from a urine sample on a random basis. The employer uses a third-party company to randomly select employees. Claimant was selected based on a computer based, random number generator. Claimant was selected from a pool of employees. The test was given during claimant's normal business hours. The test was a split cup urine test. The sample was tested by a certified lab. The sample came back confirmed positive. The results were sent to a MRO (medical review officer) and were certified as a positive result. Claimant asked when she was being tested if the company wanted to know what medication she was taking. Claimant was told that she would be given a reasonable time to respond to the MRO about what prescription medication she was taken. The MRO called claimant on August 28, 2015 but she was at work and did not get the message until later. Claimant told her supervisor on Saturday, August 29, 2015 about missing the MRO's phone call and the supervisor told her to contact the MRO immediately on Monday, August 31, 2015. Claimant called the MRO on Monday, August 31, 2015 at 8:02 a.m. and 8:30 a.m. and left messages saying she was returning the MRO's call and left her phone number. Later on August 31, 2015, the MRO called claimant three separate times at 2:03 p.m., 2:04 p.m., and 2:05 p.m. but did not reach her. The MRO then turned the results in to the employer on August 31, 2015 at 2:06 p.m. Claimant had been taking prescription medicine but did not get to

tell the MRO prior to the results being given to the employer. The result of claimant's positive drug screen was reported to the employer on August 31, 2015. Ms. Allen met with claimant in person to discuss the positive result. Ms. Allen gave claimant a paper that she had been tested and positive result and that she can have the second sample tested at lab of her choice and about getting a confirmation. Ms. Allen did not send anything by certified mail. Claimant signed a copy of the letter on August 31, 2015 informing her of the positive test result and that she could obtain a confirmatory test of the second sample. Ms. Allen testified claimant received a copy of the letter she signed on August 31, 2015. Claimant testified she did not receive a copy of the letter she signed on August 31, 2015. Claimant testified she only received her test results. Claimant never made a request to test the second sample. The results were not provided to claimant in writing delivered by certified mail, return receipt requested. The positive result was the sole reason for claimant's discharge.

The employer has a written drug and alcohol policy. No documentary evidence of the written drug screen policy was offered. Claimant signed that she read and understood the policy. Claimant was given a copy of the policy. The policy provides for uniform standards for actions that are taken in case of a confirmed positive test or refusal to submit to testing. The policy also provides for termination without first offering rehabilitation services. The employer does have an employee assistance program. The employee assistance program is posted throughout the plant and is mailed to each employee every year and given upon new hires. The employer does provide training to supervisory personnel regarding drug and alcohol abuse.

The employer did not participate in the fact-finding interview because of mail issues that were internal 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. Benefits are allowed.

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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.

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).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy. The employer has the burden of proving disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982).

Iowa Code § 730.5 allows drug testing of an employee upon "reasonable suspicion" that an employee's faculties are impaired on the job or on an unannounced random basis. There is no dispute that the employer tested claimant on a random basis. Iowa Code § 730.5 also allows testing as condition of continued employment or hiring. Iowa Code § 730.5(4). Iowa Code § 730.5(9) requires that a written drug screen policy be provided to every employee subject to testing. There is also no dispute that claimant was given a copy of the employer's drug screen policy. Iowa Code § 730.5(7)(i)(1) mandates that an employer, upon a confirmed positive drug or alcohol test by a certified laboratory, 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. Although the employer informed claimant in person regarding the results of her test, the employer failed to follow the strict and explicit statutory requirements in Iowa Code § 730.5(7)(i)(1). The employer did not provide notice "in writing by certified mail, return receipt requested" to claimant. Iowa Code § 730.5(7)(i)(1). Furthermore, claimant disputed Ms. Allen's testimony that she received a copy of the letter she signed on August 31, 2015. Claimant testified she did not receive a copy of the letter she signed on August 31, 2015. Ms. Allen testified that the letter claimant signed detailed her rights after positive test result for drugs. The signed letter was also not provided for the hearing. Had the employer provided the letter via "certified mail, return receipt requested" there would be no dispute claimant had proper notice of her rights after a positive test result. Iowa Code § 730.5(7)(i)(1). 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).

While the employer certainly may have been within its rights to test and fire claimant, it failed to provide her sufficient notice (notice "in writing by certified mail, return receipt requested") of the test results according to the strict and explicit statutory requirements. Iowa Code § 730.5(7)(i)(1). Thus, the employer cannot use the results of the drug screen as a basis for disqualification from benefits. Because the sole reason for claimant's discharge was the test results, the employer has not established any disqualifying misconduct. Benefits are allowed.

Furthermore, although the MRO attempted to contact claimant prior to providing the test results, the MRO did not provide claimant an adequate "opportunity to provide any information which may be considered relevant to the test, including identification of prescription or nonprescription drugs currently or recently used[.]" Iowa Code § 730.5(7)(c)(2). Claimant attempted to provide this information at the time of the test and was told to wait. The MRO first attempted to contact claimant on Friday while she was at work. When claimant tried twice to return the MRO's phone call on Monday, August 31, 2015, she was unable to reach the MRO. The MRO then attempted three phone calls, one minute apart, to reach claimant. The MRO's allowance of three minutes to call back, knowing claimant had tried to contact the MRO on August 31, 2015, before turning the results in to the employer is not reasonable. Benefits are allowed.

DECISION:

The October 9, 2015 (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

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