

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RONALD E SANDERS
Claimant

APPEAL NO: 09A-UI-11533-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**L A LEASING INC
SEDONA STAFFING**
Employer

**OC: 07/12/09
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

Sedona Staffing filed a timely appeal from a representative's decision dated August 6, 2009, reference 01, which held claimant eligible to receive unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on August 26, 2009. The claimant participated personally. The employer participated by Ms. Abby Schuller, Account Manager. Employer's Exhibits A, B and C were received into evidence.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Having reviewed the evidence in the record, the administrative law judge finds: Ronald Sanders was employed by L. A. Leasing Inc., doing business as Sedona Staffing most recently from November 13, 2008 until December 16, 2008 when he was discharged from employment. Mr. Sanders was assigned to work at Maquoketa Web Printing Company as a production worker on a "temp-to-hire" basis. The claimant was paid by the hour. His contact person at Sedona Staffing was Abby Schuller.

On November 28, 2008, Mr. Sanders received a minor injury while performing his duties at the printing facility. Sedona Staffing was notified of the injury on December 1, 2008 and the claimant was required to undergo drug testing 16 days later on December 17, 2008. The claimant was allowed to continue working in the interim. At the time of hire Mr. Sanders had been informed of Sedona Staffing's drug testing policy and acknowledged a receipt of the policy. Mr. Sanders underwent drug testing at Jackson County Hospital and the test samples were sent to Occupational Medical Consultants for testing. The test results showed a positive result for the presence of marijuana in Mr. Sanders' system. The claimant was subsequently contacted by a medical review officer who is employed by Occupational Medical Consultants and informed of the positive test results verbally. Mr. Sanders did not receive notification of the positive test results by letter that was registered with return signature required. The claimant

was verbally told of the possibility of having a confirmatory test but was told by the medical review officer to do so would make his positive test results a matter of "public records." The claimant chose not to have a confirmatory test although he maintained both to the medical review officer as well as to his employer that the test results were wrong as he did not drink or take drugs. The company does not have a policy that reimburses employees for the cost of confirmatory tests if the results are negative. The employer's substance abuse policy is set forth in the agreement signed by employees. (See Exhibit C).

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Sanders was discharged for misconduct in connection with the employment. It does not.

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.

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a 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 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. 1992).

Allegations of misconduct without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling or unable to furnish evidence to corroborate an allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that more direct evidence will expose deficiency in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

Iowa Code 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. Iowa Employment Appeal Board, 602 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 requirements for the drug test the test could not serve as a basis for disqualifying a claimant for benefits. In the present case the employer had a reasonable suspicion to request an urinalysis but the employer's policy, manner of notification and the ability of the employee to have re-testing of the split sample at no cost if found to be negative must comply with Iowa Code section 730.5. Accordingly, it is not authorized by law and cannot serve as a basis for disqualifying Mr. Sanders from unemployment insurance benefits.

The evidence in the record with respect to the qualifications of the testing laboratory, the medical review officer and method of testing and confirmatory testing are based on hearsay evidence. While hearsay evidence is admissible in an administrative proceeding, it cannot be accorded the same weight as given to direct testimony.

In order for a private sector's drug testing to meet the requirements of Iowa Code section 730.5, the employer must have a written drug policy identifying drugs that employees are subject to being tested for and stating uniform application of disciplinary actions to be taken for violations. This specimen or sample taken shall be of sufficient quantity to permit a second independent confirmatory test and must be stored for at least 45 calendar days by the testing laboratory. The testing laboratory must be a certified laboratory for the testing of specimens. The law requires that a medical review officer review and interpret test results and consider any information provided by the individual.

The law further specifically requires that the employer shall notify the employee in writing by certified mail, return receipt requested of the results of the test and of the employee's right to request and obtain a confirmatory test of the second sample at an approved laboratory of the employee's choice and the fee payable by the employee to the employer for reimbursement of expenses shall represent only the cost associated with conducting the second test at the laboratory chosen by the employee. If the second test results do not confirm the results of the initial confirmatory test, the employer is required to reimburse the employee for the fee paid by the employee for the second test.

Because the employer's drug testing policies do not comply with Iowa Code section 730.5, it was not authorized by law and the claimant's test results under this provision cannot serve as a basis for disqualifying Mr. Sanders from unemployment insurance benefits.

Based upon the evidence in the record and the application of the appropriate law, the administrative law judge concludes that Mr. Sanders was discharged for no disqualifying reason. Accordingly, the claimant is eligible for benefits providing that he meets all other eligibility requirements of Iowa law.

DECISION:

The representative's decision dated August 6, 2009, reference 01, is affirmed. The claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed, providing the claimant meets all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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