

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARKIYONNO L WINSTON

Claimant

APPEAL NO: 15A-UI-02767-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

PACKERS SANITATION SERVICES INC

Employer

OC: 01/04/15

Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Packers Sanitation Services, Inc. (employer) appealed a representative's February 17, 2015 decision (reference 01) that concluded Markiyonno L. Winston (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 6, 2015. The claimant participated in the hearing. Eric Jackson appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

OUTCOME:

Affirmed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on or about November 20, 2014. He worked full time as a sanitation worker/sprayer in the employer's business client's Waterloo, Iowa meat processing facility, working an overnight shift from 11:30 p.m. His last day of work was the shift that ended on the morning of December 29, 2014. The employer effectively discharged him on that date. The reason asserted for the discharge was that the claimant had refused to take a drug test.

On the shift of December 24 the claimant had done something to injure his back. He had attempted to call in to the employer to report the incident and his resulting absences, but the employer's phone system was not set up to allow him to do so. He therefore went to his personal doctor for treatment.

He sought to return to work on the night of December 28. The employer first told him he would be discharged for his absences, but he was able to show the employer that it was its phone system which had prevented the claimant from being able to report the injury or the absences. The employer then determined that the claimant needed to be seen by its own occupational health doctor. The claimant was made to wait until the morning of December 29 to be taken to the clinic.

Even though five days had passed since the injury occurred, the employer asserted that the claimant was required to submit to a “post-accident” drug test. The claimant provided a urine sample for a drug test and then was seen by the doctor. The claimant denies that anything was said to him about any problem with the urine sample. When he and the employer’s representative who was with him left the clinic, he was told he should not report back to work until he heard further from the employer. When he did hear something further, it was simply that the employer was denying any workers’ compensation coverage.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant’s employment, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. Rule 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. Rule 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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. Rule 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is the assertion that he refused to give a urine sample for a “post-accident” drug test. The employer relies exclusively on the second-hand account from its workers’ compensation representative; however, without that information being provided first-hand, the administrative law judge is unable to ascertain whether that person might have been mistaken, whether she actually observed the alleged refusal, whether she is credible, or whether the employer’s witness might have misinterpreted or

misunderstood aspects of her report. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant in fact refused to provide a sample. Further, the employer has not established that even seeking a drug test five days after the injury is allowed as a "post-accident" drug test under Iowa Code § 730.5; the administrative law judge notes that the reason for true post-accident testing is to determine whether the injured employee was under the influence of some substance at the time of the injury, and a urine sample collected five days after the fact could not yield a valid result for that inquiry.

The employer has not met its burden to show disqualifying misconduct. *Cosper*, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's February 17, 2015 decision (reference 01) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs