

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CYNTHIA BRINKMAN
Claimant

APPEAL NO: 14A-UI-12516-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

FORWARD AIR SOLUTIONS INC
Employer

OC: 11/09/14
Claimant: Respondent (1)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the November 26, 2014, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on December 30, 2014. The claimant participated in the hearing. Wes Phipps, Operations Manager and Amanda Singletary, Dock Supervisor, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time office manager for Forward Air Solutions from September 29, 2014 to October 10, 2014. She was required to take a pre-employment drug test prior to beginning her employment and drove herself to Concentra, the testing site at 8:20 a.m. on September 30, 2014. The testing site was clean and sanitary.

The lab told the claimant what it would be testing for but the employer does not know, and the claimant denies, that the lab asked the claimant what medications she was on that might affect the outcome of the test or told her it split the sample. The employer could not state the name of the medical review officer (MRO) who called the claimant and employer to state her test results and the claimant stated she was not notified of the positive test or what she tested positive for either by phone or by the required certified letter, return receipt requested, stating the results of her test and that she had the right to have the split sample retested, at a certified lab of her choosing, at reasonable cost. The claimant signed the employer's written drug and alcohol policy September 29, 2014.

The claimant was absent due to illness for a few days and when she returned to work she was advised to turn in her badge and told the employer would talk to her later. The first time the

claimant became aware of the allegations or positive test result occurred during the fact-finding interview regarding her unemployment insurance benefits.

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.

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.

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 misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Misconduct must be substantial in order to justify 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 insurance 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. 1990).

Iowa Code section 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. Employment

Appeal Board, 606 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 requirement for the drug test, the test could not serve as a basis for disqualifying a claimant for benefits. In the present case, the employer requested the drug test as part of a pre-employment process but the employer failed to comply with Iowa Code section 730.5. Accordingly, the drug test was not authorized by law and cannot serve as the basis to disqualify the claimant from unemployment insurance benefits.

The evidence in the record clearly establishes that the claimant was not informed by certified mail, return receipt requested, of the test results and the right to be retested to obtain a confirmatory test of the secondary sample under the appropriations of section 730.5(7)(i)(1) and (2), which require that if a confirmed positive test result is received by the employer, the employer must notify the employee by certified mail, return receipt requested, of the results of the test and the right to be retested and to obtain a confirmatory test of the secondary sample. The employee must be informed that she may choose a certified lab of her own choosing, that the fee, while payable by the employee, be comparable in cost to the employer’s initial test, and that the employee has seven days from the date of mailing to assert her right and request to be retested.

The Supreme Court of Iowa in the case of Jerrie Laverne Sims v. NCI Holding Corporation, et. al, No. 07-1468, Filed January 9, 2009, held that strict compliance with the notice provision of section 730.5, the Drug Free Workplace Statute, is required. The court held that the notice requirement within the statute focuses more directly on the protection of employees who are required to submit to drug testing and that section 730.5(7)(i)(1) accomplishes the protective purpose of the statute by mandating written notice by certified mail of (1) any positive drug test, (2) the employee’s right to obtain a confirmatory test, and (3) the fee paid by the employee to the employer for reimbursement of the expense of that test. The court held that such a formal notice conveys to the addressee “a message that the contents of the document are important and worthy of the employee’s deliberate reflection.” In deciding whether substantial compliance has taken place, the court cited Harrison v. Employment Appeal Board, 659 N.W.2d 581. 586 (Iowa 2003) in stating “although an employer is entitled to have a drug free workplace, it would be contrary to the spirit of Iowa’s drug testing law if we were to allow employers to ignore the protections afforded by this statute...”

The court concluded that the verbal notice provided by NCI at the time of Sims’ termination regarding the right to have the testing of the sample was insufficient to convey to Sims all of the employee protections afforded by section 730.5(7). The court held that although Sims was verbally informed of the right to undertake a confirmatory test, the verbal notice was incomplete and failed to adequately convey the message that the notice was important. It was noted that a written notice sent by certified mail conveys the importance of the message and the need for deliberate reflection. The court further held that NCI did not come into substantial compliance with the statutory obligation under section 730.5(7) when it sent a written notice to Sims several months after he was discharged. The court concluded that verbal notice provided at that time of termination was insufficient to convey to Sims all of the employee protections afforded by section 730.5(7). It held that although the verbal notice informed the employee of his right to take a confirmatory test, the verbal notice was incomplete and did not adequately convey the message the notice was important.

In view of the strict position taken by the Iowa Supreme Court in the Sims case, the administrative law judge concludes that the employer in this case did not establish strict nor

substantial compliance with section 730.5 of the Drug Free Workplace Statute. The administrative law judge further concludes, based upon the strict interpretation placed on the requirements of the statute in the Sims case by the Iowa Supreme Court, that the employer's third party testing site did not give the claimant an opportunity to notify it what substances the claimant may have been taking legally that could affect the outcome of the claimant's drug screen.

Because, among other employer failures to follow the testing requirements, the employer's notice to the claimant of the positive test did not comply with Iowa Code section 730.5, the test was not authorized by law and cannot serve as the basis for disqualifying the claimant from unemployment insurance benefits. Based upon the evidence in the record and the application of the appropriate law, the administrative law judge must conclude that the claimant was discharged for no disqualifying reason. Accordingly, benefits are allowed.

DECISION:

The November 26, 2014, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/css