

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

ANDREW M LESTER
10220 S AVE
WESTBORO MO 64491

MANPOWER INTERNATIONAL INC
MANPOWER TEMPORARY SERVICES
C/o TALX UC EXPRESS
PO BOX 66864
ST LOUIS MO 63166-6864

Appeal Number: 05A-UI-05081-AT
OC: 04-03-05 R: 12
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge
730.5 – Private Sector Drug-Free Workplaces

STATEMENT OF THE CASE:

Manpower International, Inc. filed a timely appeal from an unemployment insurance decision dated May 4, 2005 reference 01 which allowed benefits to Andrew M. Lester. After due notice was issued, a telephone hearing was held June 1, 2005 with Staffing Specialist Todd Ashenfelter participating for the employer. Ms. Lester did not provide a telephone number at which he could be contacted.

FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, the administrative law judge finds: Andrew M. Lester was employed by Manpower International, Inc. from June 18, 2004 until he was discharged following a drug test administered on March 30, 2005.

Manpower International has a written drug testing policy. Mr. Lester was not given a copy of the policy but was allowed to review it when hired. A copy was placed in his personnel file. The company tests employees when required by one of its clients or following an accident. Mr. Lester was to be assigned to Eaton Corporation, a client which requires a drug test. Manpower's laboratory advised the employer that Mr. Lester's test was positive for THC, that is, marijuana. Staffing Specialist Todd Ashenfelter discharged Mr. Lester after orally advising him of the positive test and of his right to request analysis of the split sample at a laboratory of his choosing at his personal expense. Mr. Ashenfelter did not provide an estimate of the cost of such a test. Mr. Ashenfelter did not send a certified letter to Mr. Lester and discharged him immediately.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in this record establishes that Mr. Lester was discharged under circumstances constituting job related misconduct. 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof. See Iowa Code section 96.6-2. In the present case, the employer must establish by a preponderance of the evidence that it discharged Mr. Lester for failing a mandatory drug test carried out in compliance with the provisions of Iowa Code section 730.5. Section 730.5 requires among other things that the employer notify an employee of a positive drug test by certified mail. The statute requires that an employee be given seven days from the mailing date to indicate whether or not he or she requests the second confirmatory test. IN the case Harrison v. Employment Appeal Board, 659 N.W.2d 581 (Iowa 2002), the Supreme Court of Iowa ruled that the employer did not substantially comply with the notice requirements of the statute because the employee had not been informed in writing of his right to the second confirmatory test or that he had seven days to make his decision. The fact in this case closely resemble those in Harrison. The administrative law judge concludes that substantial compliance with section 730.5 has not been established. Because of this, no disqualification may be imposed.

DECISION:

The unemployment insurance decision dated May 4, 2005 reference 01 is affirmed. The claimant is entitled to receive unemployment insurance benefits, provided he is otherwise eligible.

sc/pjs