

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

MICHAEL W NELSON
Claimant

ARCHER-DANIELS-MIDLAND CO
Employer

APPEAL NO. 18A-UI-02591-B2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 02/04/18
Claimant: Appellant (1)

Iowa Code § 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated February 23, 2018, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on March 26, 2018. Claimant participated personally. Employer participated by Bryce Albrechtsen. Employer's Exhibits 1-12 were admitted into evidence.

ISSUE:

The issue in this matter is whether claimant was discharged for misconduct?

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant last worked for employer on January 2, 2018.

Employer discharged claimant on February 8, 2018, because claimant tested positive on a drug test given in accordance with a Post Positive Test Continued Employment Agreement entered into by claimant on July 25, 2017. (Emp. Ex. 7). Claimant was informed of the oral test, which was conducted by an MRO. Claimant's saliva tested positive for methamphetamine as indicated in official medical documents. Employer stated that claimant had tested positive for amphetamine in multiple documents. This was stated to be a scrivener's error by employer.

Employer alerted claimant of the positive test and his ability to have a split-sample test conducted by certified mail. Claimant did respond that he wished to have the split sample done, but did not give the necessary funds to conduct this testing at the time of his request. This delayed employer's retesting of the sample for two weeks until employer was alerted claimant hadn't paid. Upon getting claimant to pay for the split-sample testing, the testing was done and confirmed positive.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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).

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. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982), Iowa Code § 96.5-2-a.

In order to establish misconduct 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 Ct. 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 the employee's duties and obligations to the employer. Rule 871 IAC 24.32(1)a; *Huntoon supra*; *Henry supra*.

Iowa Code section 730.5(8) sets forth the circumstances under which an employer may test employees for the presence of drugs. 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 and the right to obtain a confirmatory test before taking disciplinary action against an employee. 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 Employment Appeal Board*, 602 N.W.2d 553, 557, 558 (Iowa 1999).

Iowa law requires substantial rather than strict compliance with the requirements of Iowa Code §730.5. Those directives which must be complied with include, "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 payable by the employee to the employer for reimbursement of the expense of the test. Iowa Code §730.5(7)(i)(1). *Sims v. NCI Holding Corp.*, 759 N.W.2d 333, 338 (Iowa 2009). 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 Employment Appeal Board*, 602 N.W.2d 553, 557, 558 (Iowa 1999). In this instance, employer did strictly comply with those provisions of Iowa Code §730.5 which must be followed exactly. Claimant was notified of the positive drug test and his options for the split sample testing. Employer did ask for the payment of the funds before the secondary testing may be conducted. Claimant points out employer's misidentification of the drug which was positive on two occasions. This is seen by the administrative law judge as substantial compliance with requirements. Claimant was on notice of his positive test, and further was on notice of the procedures to have his sample further tested. Additionally, the actual testing results listed the correct substance for which claimant tested positive. The error in company wording is not deemed a substantial error.

Claimant also has not shown a substantial error on the part of the employer through the extended length of time between the initial positive test and the date of termination. This date was extended two extra weeks as claimant did not forward money for the additional testing at the time he requested the additional testing of his split sample. This delayed the testing for weeks, but claimant has not shown that the test was flawed in any way because of this additional time period brought on by his own lack of immediate payment.

In this matter, the evidence established that claimant was discharged for an act of misconduct when claimant violated employer's policy concerning testing positive for controlled substances. Claimant was warned concerning this policy.

The last incident, which brought about the discharge, constitutes misconduct because claimant knew of employer's testing policies and tested positive on multiple occasions. Employer substantially followed testing procedures mandated by the Iowa Code. The administrative law judge holds that claimant was discharged for an act of misconduct and, as such, is disqualified for the receipt of unemployment insurance benefits.

DECISION:

The decision of the representative dated February 23, 2018, reference 01, is affirmed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible.

Blair A. Bennett
Administrative Law Judge

Decision Dated and Mailed

bab/scn