

**BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319**

LUKE E SHERMAN

Claimant,

and

VALERO SERVICES INC

Employer.

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HEARING NUMBER: 12B-UI-12827

**EMPLOYMENT APPEAL BOARD
DECISION**

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-2-A, 730.5

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The Employer appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board, one member concurring, reviewed the entire record. The Appeal Board finds the administrative law judge's decision is correct. The administrative law judge's Findings of Fact and Reasoning and Conclusions of Law are adopted by the Board as its own. The administrative law judge's decision is **AFFIRMED**.

John A. Peno

CONCURRING OPINION OF MONIQUE F. KUESTER:

I agree with my fellow board member that the administrative law judge's decision should be affirmed; however, I would comment that while the Employer may have compelling business reasons to terminate the Claimant, conduct that might warrant a discharge from employment will not necessarily sustain a

disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa App. 1983). It is important for Employer to be fully aware of the requirements of Iowa Code 730.5, and that they take a look at their policies and procedures to ensure that they comply with the law. In spite of the evidence as presented:

- signed employee guide acknowledgement;
- signed substance abuse policy acknowledgement;
- a clear disciplinary report explaining that the claimant had failed a random drug test;
- a letter of termination;
- signed consent to submit to the drug/alcohol testing;
- MRO report;
- applicable substance abuse policy pages.

The administrative law judge points out in her decision that the employer violated several provisions of failed to adhere to several sections in the Iowa Code 730.5, specifically:

- the employer failed to give the claimant notice of test results; and
- the employer also failed to “give an opportunity for a split sample test

These issues clearly gave the administrative law judge justification to conclude there was no disqualification based on the drug test, as the Employer failed to comply with Iowa Code section 730.5. I would note that had the Employer revised and adjusted their policies and procedures, the decision could have gone in their favor.

In this instance, the Claimant (who was a no-show at the hearing) was aware of the Employer’s substance abuse policy and signed all relevant forms. It was the Claimant who chose not to take advantage of the split sample opportunity. (Tr. 3, lines 28-34) The Claimant failed to communicate to the Employer any rational explanation for the positive results. Furthermore, when the Claimant was asked if there were any prescription medications he took that might account for the positive test result, he failed to respond. (Tr. 4, lines 4-11) It seems very likely that the Claimant violated the Employer’s substance abuse policy which resulted in his termination. However, the burden of proof is on the Employer to prove that, which would have been facilitated by their strict compliance with the provisions of 730.5.

Monique F. Kuester

AMG/fnv