

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

DANIEL E FRY
Claimant

C-FAB LLC
Employer

APPEAL 14A-UI-10099-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 08/31/14
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge/Misconduct
Iowa Code § 730.5 – Private Sector Drug-free Workplaces

STATEMENT OF THE CASE:

The claimant filed an appeal from the September 22, 2014, (reference 01) unemployment insurance decision that denied benefit. The parties were properly notified about the hearing. A telephone hearing was held on October 16, 2014. Claimant participated and was represented by Christopher Bruns, Attorney at Law. Employer participated through Todd Cleppe, Owner and Brian Dirks, On-site Supervisor. Employer's Exhibit One was entered and received into the record.

ISSUE:

Was the claimant discharged due to job-connected misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a field technician beginning on February 3, 2014 through September 3, 2014 when he was discharged for testing positive for marijuana in a drug test taken on August 28, 2014.

The employer heard rumors that employees were smoking marijuana in the parking lot at one of the job sites. The claimant was never identified as an employee who was seen smoking marijuana; he was just with the other employees who were identified as potentially smoking marijuana.

On August 28 the employer had no particular reason to believe that the claimant was under the influence of any illegal drugs. None of his actions or behavior led the employer to any type of reasonable suspicion that the claimant was under the influence. After gathering all of the employees they announced that all eight employees would be tested. All employees were transported to the testing facility.

After the announcement was made, the claimant went to the office where he told both Mr. Cleppe and Mr. Dirks that he would test positive for marijuana because he had smoked over

the weekend. The employer chose not to discharge the claimant after he admitted smoking marijuana, but instead encouraged him not to quit, but to wait and see how his drug test came out. The claimant was allowed to work the remainder of the day as the employer did not believe he was under the influence of any illegal substance.

When the employer received the drug test results on September 3, the claimant was discharged. The employer did not notify the claimant of his test results and the ability to have the split sample tested by certified mail until they sent him a certified letter on October 15, one day prior to the hearing. The claimant had not received the letter at the time of the hearing. The claimant had not been given a copy of the employer's drug testing policy.

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 § 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 job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The employer made their decision

based upon the positive drug test, not the claimant's admission, as they took no action until after the drug test result was known to them.

Iowa Code § 730.5 allows drug testing of an employee if, among other conditions, the employer has “probable cause to believe that an employee’s faculties are impaired on the job.” Upon a positive drug screen, Iowa Code § 730.5(3)(f) requires that an employer offer substance abuse evaluation and treatment to an employee the first time the employee has a positive drug test. Iowa Code § 730.5(9) requires that a written drug screen policy be provided to every employee subject to testing. 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. Upon a positive drug screen, Iowa Code § 730.5(9)(g) requires, under certain circumstances, that an employer offer substance abuse evaluation and treatment to an employee the first time the employee has a positive drug test. 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).

The employer failed to provide a written copy of the drug testing policy to the claimant, failed to give him notice of the test results according to the strict and explicit statutory requirements, and failed to allow him an opportunity for another test even if a split sample was taken. The employer denied a substance abuse evaluation, but did not provide information to the claimant about an employee assistance program or other substance abuse programs as required by Iowa Code § 730.5(9)(c). Thus, employer cannot use the results of the drug screen as a basis for disqualification from benefits. Benefits are allowed.

DECISION:

The September 22, 2014, reference 01, decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/css