

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KENDALL W KAUFMAN
Claimant

APPEAL NO. 16A-UI-09962-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

ALLIED VALVE INC
Employer

OC: 08/21/16
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Allied Valve (employer) appealed a representative's September 7, 2016, decision (reference 01) that concluded Kendall Kaufman (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for September 28, 2016. The claimant participated personally. The employer participated by Bill Morgan, General Manager; Mark Zinger, Shop Supervisor; John Pocivasek, Controller; and Amy de la Bruere, Human Resources Associate. The employer offered and Exhibit One was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on July 27, 2011, as a full-time valve technician. The claimant signed for receipt of the employer's handbook which contains a drug testing policy. The policy allows for pre-employment drug testing, random drug testing, and reasonable suspicion drug testing. The employer performs work for clients who want the employer's workers tested before doing work for them. The employer also sends its employees for drug testing before sending them on certain jobs. So long as the employer has had the employee tested, the employer can send an employee out on the job. The worker may perform the work if the test results are positive but not received until after the work is completed for the client.

In September 2013, the claimant tested positive for marijuana. The employer placed the claimant on a less safety sensitive job. In October 2013, the employer paid for six weeks of rehabilitation. On March 2, 2015, the employer gave the claimant a written warning after he tested positive for marijuana on February 24, 2016. The employer notified the claimant that further infractions could result in termination from employment. The employer gave the claimant the option of having a confirmatory test with a new sample being taken within seven days of

March 2, 2016. In June 2015, the claimant was assessed and random testing was performed. The claimant did not test positive.

On August 1, 2016, the employer told the claimant to submit to drug testing because he was going to be sent to work for a client that required a drug test. The claimant took the test on August 1, 2016, and started working for the client on August 3, 2016, before the result was received. The claimant worked for the client who required the drug testing until August 8, 2016. The laboratory telephoned the claimant with results. The employer received a copy of the results on August 8, 2016, but did not give a copy to the claimant. The employer terminated the claimant on August 9, 2016. The employer told the claimant he could come back to work because the employer thought he was a good employee. The claimant did not receive a copy of the results of the testing until a week before the appeal hearing.

The claimant filed for unemployment insurance benefits with an effective date of August 21, 2016. The employer participated personally at the fact finding interview on September 6, 2016, by Bill Morgan, John Pocivasek, Mark Zinger, and Amy de la Bruere.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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). Iowa Code Section 730.5(8)(3) indicates the instances in which an employer may conduct drug or alcohol testing of employees. The Iowa Code does not indicate that an employer may test employees because clients want testing. Random testing on a frequent basis would accomplish this. Iowa Code Section 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 employer terminated the claimant without giving him a copy of the results. 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 at 558. The employer failed to follow the strict and explicit statutory requirements. Benefits are allowed.

DECISION:

The representative's September 7, 2016, decision (reference 01) is affirmed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/pjs