

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**EDWARD L SHULTZ**  
Claimant

**THOMAS L CARDELLA & ASSOCIATES INC**  
Employer

**APPEAL 17A-UI-01335-SC-T**  
**ADMINISTRATIVE LAW JUDGE**  
**DECISION**

**OC: 12/18/16**  
**Claimant: Respondent (1)**

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Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment  
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

**STATEMENT OF THE CASE:**

Thomas L. Cardella & Associates, Inc. (employer) filed an appeal from the January 25, 2017, (reference 02), unemployment insurance decision that allowed benefits based upon the determination it failed to provide sufficient evidence to show it discharged Edward L. Shultz (claimant) for disqualifying misconduct. The parties were properly notified about the hearing. A telephone hearing was held on February 27, 2017. The claimant did not respond to the hearing notice and did not participate. The employer participated through Senior Workforce Management Specialist Michelle Snider and Administrative Assistant Keisha Manternach. It was represented by Barbara Tuney. Employer's Exhibit 1 was received. Official notice was taken of the administrative record, specifically the fact-finding documents.

**ISSUES:**

Was the claimant discharged for disqualifying job-related misconduct?  
Has the claimant been overpaid unemployment insurance benefits?  
Can the repayment of those benefits to the agency be waived?  
Can charges to the employer's account be waived?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a Customer Care Agent beginning on December 28, 2015, and was separated from employment on January 5, 2016, when he was discharged for a violation of the employer's drug free workplace policy. The employer's policy states that all prospective employees are subject to post-offer, pre-employment drug tests. The policy states if a prospective employee tests positive, he will be notified he is no longer being considered for employment and can request his records related to the drug test. If an employee tests positive, then the employer will notify him in writing sent by certified mail, return receipt requested, of the positive result and his ability to have a confirmatory request performed at his own cost. The claimant's offer letter which he signed on December 3, 2015, states, "This offer is contingent upon your successful completion of all required pre-employment screenings, and screening

must be completed prior to the start of training." (Employer's Exhibit 1, page 009. Emphasis in original.)

On December 23, 2015, the claimant reported for his post-offer, pre-employment drug test. He was tested at a lab and a split sample was collected. On December 28, 2015, before receiving the results of the drug test, the claimant began working for the employer and received a copy of the employer's drug free workplace policy. On January 4, 2016, the employer received notice that the claimant's drug test had tested positive for marijuana. On January 5, 2016, Administrative Assistant Keisha Manternach, who was training the claimant, notified him via telephone that his employment was terminated due to the positive drug test. She also notified him orally that he had the right to request a confirmatory test of the split sample. The claimant did not ask for a confirmatory test.

The administrative record reflects that claimant has not received any unemployment insurance benefits since filing a claim with an effective date of December 18, 2016. The administrative record also establishes that the employer did not participate in the fact-finding interview, make a first-hand witness available for rebuttal, or provide written documentation that, without rebuttal, would have resulted in disqualification.

#### **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. Benefits are allowed, provided he is otherwise eligible.

Iowa law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id.* Iowa regulations define misconduct, stating:

"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.

Iowa Admin. Code r. 871-24.32(1)a. 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 issue is not whether the employer made a correct decision in separating the claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984).

Private employers wishing to drug test employees and prospective employees must follow Iowa Code § 730.5. The statute defines an employee as someone who works for the employer and a prospective employee as someone who applies to work for the employer. Iowa Code § 730.5(1)(a) and (h). Employees and prospective employees have different rights under the statute. While the employer may drug test both classifications, it has different obligations depending on the individual's classification.

The employer is required to provide a copy of its written drug screen policy if an employee is subject to testing. Iowa Code § 730.5(9). The employer is also required to notify an employee in writing sent by certified mail, return receipt requested, of a positive result to the drug test and the employee's right to obtain a confirmatory test before taking disciplinary action against the employee. Iowa Code § 730.5(7)(i)(1). Additionally, an employer is required to notify a prospective employee in writing of the failed test and his right to request the records related to the test. Iowa Code § 730.5(7)(i)(2). 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 Emp't Appeal Bd.*, 602 N.W.2d 553, 557, 558 (Iowa 1999).

In this case, the employer allowed the claimant to transition from a prospective employee to an employee before receiving the results of the drug test which requires the employer to follow the drug testing requirements associated with an employee. While the employer certainly was within its rights to test the claimant prior to hiring him, it failed to provide sufficient notice of the test results and an opportunity for a split sample test according to the strict and explicit statutory requirements. Thus, the employer cannot use the results of the drug screen as a basis for disqualification from benefits and benefits are allowed, provided the claimant is otherwise eligible.

As benefits are allowed, the issues of overpayment and repayment are moot and charges to the employer's account cannot be waived.

**DECISION:**

The January 25, 2017, (reference 02), unemployment insurance decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. The issues of overpayment and repayment are moot and charges to the employer's account cannot be waived.

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Stephanie R. Callahan  
Administrative Law Judge

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Decision Dated and Mailed

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