

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**TIMOTHY D WURTZEL**  
Claimant

**APPEAL NO. 07A-UI-02598-LT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**EXPRESS SERVICES INC**  
Employer

**OC: 02/04/07 R: 02**  
**Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge/Misconduct  
Iowa Code § 730.5 – Private sector drug-free workplaces

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the March 9, 2007, reference 02, decision that allowed benefits. After due notice was issued, a telephone conference hearing was held on March 29, 2007. Claimant participated. Employer participated through Andre Smith.

**ISSUE:**

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits.

**FINDINGS OF FACT:**

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant was employed as a temporary full-time laborer at MaxYield Coop from September 12, 2006 until November 17, 2006, when he completed the assignment and notified Express of the separation. Express administered a preemployment drug screen on November 20, 2006, which was positive for the presence of methamphetamine. Express did not offer a retest or split sample or advise him he could dispute the results and be retested by a physician. Employer did tell him that he could retest if he thought he could pass but did not provide the test results in writing. Claimant denies the use of illegal drugs but told employer he was using cold medicine at the time. He also failed a drug screen again on January 8, 2007, for which employer followed the same procedure and inactivated claimant from placement in job assignments. No documentary evidence of a written drug screen policy was offered.

**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.

871 IAC 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.

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 § 730.5(4) provides: *Testing as condition of employment -- requirements*. To the extent provided in subsection 8, an employer may test employees and prospective employees for the presence of drugs or alcohol as a condition of continued employment or hiring. An employer shall adhere to the requirements of this section concerning the conduct of such testing and the use and disposition of the results of such testing.

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 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 March 9, 2007, reference 02, decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

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Dévon M. Lewis  
Administrative Law Judge

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Decision Dated and Mailed

dml/kjw