

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ANGELO D SITZMAN
Claimant

APPEAL NO. 09A-UI-08648-E2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

THE AMERICAN BOTTLING COMPANY
Employer

**Original Claim: 05/10/09
Claimant: Respondent (1)**

Iowa Code § 96.5-2-a – Discharge for Misconduct
Iowa Code § 730.5 – Private Sector Drug-Free Workplace

STATEMENT OF THE CASE:

The employer filed an appeal from a representative's decision dated June 8, 2009, reference 01, which held the claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on July 2, 2009. The claimant participated personally. The employer participated by Brenda Dixon, Human Resources Business Partner. Exhibit 1, pages 1 through 11, was admitted into evidence.

ISSUE:

The issue in this matter is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds: The claimant was working in a warehouse and was injured when a fork truck hit him on April 15, 2009. The claimant was slightly injured and scraped his knee. He was sent to Ottumwa Regional Occupational Health for care. Since he was involved in an accident, the employer had the claimant submit to drug testing. The claimant provided a urine sample. The sample was sent for screening and the results came back positive for marijuana. The Medical Review Officer (MRO) could not contact the claimant, so the MRO contacted the employer, who got the claimant from the plant floor and had the claimant call the MRO from the office. The MRO informed the claimant the test was positive for marijuana. The MRO did not ask the claimant any questions about any drugs or items he had taken that might have caused this positive test result. The claimant never received a letter, certified or otherwise, advising him of his right to have a split test. The employer received official notification of the positive test results on April 23, 2009 and suspended the claimant. The employer decided to discharge the claimant on April 27, 2009. The claimant was sent a letter dated April 27, 2009 terminating his employment. The employer has a drug screen policy. The claimant was told of this policy when he was hired. The employer did not believe the accident was reportable to OSHA, as there was no lost time for the injured worker or significant damage to property.

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 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) and *Harrison v. EAB*, 659 N.W. 2d 581 (Iowa 2003)

The employer failed to substantially comply with the Iowa drug testing law. The claimant was not informed of his right to ask for a split of his sample. He was not sent a certified letter advising him of this right and the time to request such a split test. He was not asked any questions by the MRO that might have explained his test result. The employer failed in many important ways to comply with Iowa Code § 730.5. It is not clear that the claimant was provided a written copy of the drug testing policy. There is a significant question as to whether the claimant was subject to drug testing at all. He did not cause the accident. No information was provided that damage exceeded \$1,000.00 and, as there were no days away from work, the accident was not reportable under Iowa Code § 730.5 (8)f. See Iowa Code § 88.6(3), 875 IAC 4.3, and 29 CFR 1904 et. seq.

For all of the reasons mentioned above, the employer cannot use the results of the drug screen as a basis for disqualification from benefits. There was no other evidence of misconduct. Benefits are allowed.

DECISION:

The June 8, 2009, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

James Elliott
Administrative Law Judge

Decision Dated and Mailed

jfe/kjw