

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JENNIFER L KAILI
Claimant

APPEAL 18A-UI-03663-DL-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

COMMONWEALTH ELECTRIC CO
Employer

**OC: 02/11/18
Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

The employer filed an appeal from the March 16, 2018, (reference 01) unemployment insurance decision that allowed benefits based upon a discharge from employment. The parties were properly notified about the hearing. A telephone hearing was held on April 13, 2018. Claimant participated. Employer participated through payroll manager Kelsey Drexel and branch manager Michael Price. Employer's Exhibits 1 through 3 were received.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time office manager in the Des Moines, Iowa, office. The separation date was February 16, 2018. Claimant did receive a copy of employer's drug and alcohol use policy. (Employer's Exhibit 1) Claimant submitted to a drug screen at a certified laboratory on January 30, 2018, because of reasonable suspicion based upon poor attendance, poor job performance, "acting weird," loss of weight, and "not acting like yourself." The result the same day was inconclusive so was sent for further testing at "escreen". The result on February 9, 2018, was positive for methamphetamine. (Employer's Exhibit 2) The MRO¹ was unable to contact claimant, so at Price's prompt on February 15, 2018, claimant called the medical review officer (MRO), who provided the results to claimant by phone. The MRO did not explain or offer an opportunity for a split sample test, nor did the employer.

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.

¹ The MRO did not participate in the hearing.

Iowa Code section 96.5(2)a provides:

Causes for disqualification.

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. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); accord *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000).

The employer has the burden of proving disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). Whether an employee violated an employer's policies is a different issue from whether the employee is disqualified for misconduct for purposes of unemployment insurance benefits. See *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000) ("Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits." (Quoting *Reigelsberger*, 500 N.W.2d at 66.)).

Testing under Iowa Code section 730.5(4) allows employers to test employees for drugs and/or alcohol but requires the employer "adhere to the requirements . . . concerning the conduct of such testing and the use and disposition of the results." Iowa Code section 730.5(1)*i* allows drug testing of an employee upon "reasonable suspicion" that an employee's faculties are impaired on the job or on an unannounced random basis. It also allows testing as condition of continued employment or hiring. Iowa Code § 730.5(4). Iowa Code section 730.5(7)(i)(1) mandates that if a medical review officer (MRO) reports a positive test result to the employer, upon a confirmed positive drug or alcohol test by a certified laboratory, notify the employee of the test results by certified mail return receipt requested, and the right to obtain a confirmatory or split-sample test before taking disciplinary action against an employee. Iowa Code section 730.5(9) requires that a written drug screen policy be provided to every employee subject to testing.

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).

While the employer certainly may have been within its rights to test and fire the claimant, the MRO and the employer failed to provide claimant with an opportunity for a split sample test according to the strict and explicit statutory requirements. See, *Sims v. HCI Holding Corp.*, 759 N.W.2d 333 (Iowa 2009), where verbal and later written notice of a split sample test was provided to claimant, thus substantially complying with the statute. Thus, the employer cannot use the results of the drug screen as a basis for disqualification from benefits.

DECISION:

The March 16, 2018, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/rvs