

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

NICK CHAPMAN
Claimant

PMX INDUSTRIES INC.
Employer

APPEAL 21A-UI-11027-CS-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 03/21/21
Claimant: Appellant (2)**

Iowa Code §96.5(2)a-Discharge/Misconduct

STATEMENT OF THE CASE:

On April 22, 2021, the claimant/appellant filed an appeal from the April 13, 2021, (reference 01) unemployment insurance decision that disallowed benefits based on claimant being discharged for violation of a known company policy. The parties were properly notified about the hearing. A telephone hearing was held on July 7, 2021. Claimant was represented by Tristan Pollard. Claimant testified during the hearing. Employer did not register a phone number to participate at the hearing. Exhibit A was admitted into the record.

ISSUE:

Was the separation a discharge for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on January 9, 2017. Claimant last worked as a full-time caster. Claimant works from 7:00 p.m. until 7:00 a.m. on a rotating schedule. Claimant was separated from employment on October 28, 2021, when he was discharged.

On October 27, 2020 at 3:00 a.m. claimant was working his shift. Claimant's supervisor, Ryan Mohr, approached him and told him he needed to go to the break room. Claimant was informed he would need to submit to a drug test based on the company's reasonable suspicion drug testing policy. Mr. Mohr told claimant he observed claimant not acting himself and acting jittery. Claimant told his supervisor that he was on a prescription for Adderall and that he was taking too much and he needed help. Employer told claimant to take the test and they would offer him rehab if it came back positive. Claimant submitted to a urine drug test at St. Luke's Work Well Solutions location in Cedar Rapids. He was never given a list of drugs the employer was testing for in the urine sample. Claimant was on an unpaid leave of absence pending the results of the drug test.

On November 3, 2020, claimant received by certified mail his results informing him he tested positive for methamphetamine. Claimant reported to the medical review officer that he was on a

prescription for Adderall and that he was taking more than his prescription. The medical review officer told claimant his prescription for Adderall did not impact his test results showing methamphetamine in his system.

In the November 3, 2020, certified letter it informed the claimant he could request a second test at a certified laboratory of his choice. The cost of the second test was not stated in the letter. Claimant did make a request for the second sample to be tested. Claimant called the employer to request the second test. The employer informed him he would need to contact the laboratory that tested the first sample. Claimant called the employer's laboratory and gave them the information of the laboratory he wanted the sample sent so they could perform the confirmatory test. The employer's laboratory told him that he could not send it to the laboratory of his choice. The laboratory that ran his first test gave him the option of sending it to two pre-approved laboratories that they had contracts with to perform confirmatory testing. The employer's laboratory informed claimant the initial test cost \$60.00 however to run the second sample it would cost the claimant \$150.00.

The claimant was running out of time to contest the employer's laboratory requirements that they could only send the second sample to two laboratories they had contracts with so he told the employer's laboratory to pick a laboratory and send it to them to run the test. Claimant never paid for the test.

On December 2, 2020, claimant received the results of the second test that confirmed that he tested positive for methamphetamine. The employer notified claimant he was terminated retroactively to October 28, 2020.

The employer has a written Alcohol and Drug Testing Policy. The policy allows for reasonable suspicion drug testing. (Exhibit A). The claimant denies that he received the Alcohol and Drug Testing Policy. Claimant was unaware there was a policy until November 2020 when he found out he tested positive and he had to go find the policy. In November 2020 claimant went to the employer and used their company intranet to locate the policy. The employer did not attend the hearing so there is no proof that claimant received the policy prior to November 2020.

REASONING AND CONCLUSIONS OF LAW:

The evidence in the record establishes a discharge for no disqualifying reason. The discharge was based on an illegal drug test.

Iowa Code section 96.5(2)(a) provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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).

Claimant was informed on December 3, 2020 he was terminated for his positive drug test. Iowa Code Section 730.5 provides the authority under which a private sector employer doing business in Iowa may conduct drug or alcohol testing of employees. Iowa Code § 730.5 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 § 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 the employer give an employee written notice of a positive test result. Such notice must be by certified mail, return receipt requested. The notice must inform the employee of his right to have a second confirmatory test done at a laboratory of his choice and it must tell the employee what the cost of that test will be. Any fee charged by the employer must be consistent with the cost to the employer of the initial confirmatory test. An employee has seven days to request a second 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 Emp't Appeal Bd.*, 602 N.W.2d 553, 557, 558 (Iowa 1999). Thereafter, in *Harrison v. Employment Appeal Board*, 659 N.W.2d 581 (Iowa 2003), the Iowa Supreme Court held that where an employer had not complied with the notice requirement set forth in the statute, the test could not serve as a basis for disqualifying a claimant for unemployment insurance benefits.

There was no proof provided that claimant was provided with the employer's alcohol and drug testing policy prior to November 2020. This is in direct violation of Iowa Code § 730.5(9). Also the employer did not abide by the notice requirements of Iowa Code § 730.5(7)(i)(1). In the certified letter they did not provide the claimant with information regarding the cost of the second confirmatory test which is a direct violation of the notice requirement. Additionally under the statute the claimant is allowed to choose his own laboratory to perform the second test. Claimant was not allowed to choose his own laboratory to perform the test and was required to send it to one of the two laboratories approved by the employer's laboratory. The price of the test was inflated for the claimant and was not the same for the employer. This is in direct violation of Iowa Code § 730.5(7)(i)(1). The employer cannot engage in illegal drug testing and then use the fruit of the poisonous tree to arguing disqualification for unemployment insurance benefits. The

claimant is eligible for benefits, provided the claimant is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The April 13, 2021, reference 01, decision is reversed. The claimant was discharged on October 28, 2020 for no disqualifying reason. The claimant is eligible for benefits, provided the claimant is otherwise eligible. The employer's account may be charged for benefits.



Carly Smith
Administrative Law Judge
Unemployment Insurance Appeals Bureau

July 19, 2021
Decision Dated and Mailed

cs/mh