

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CLAIMANT
Claimant

APPEAL NO. 10A-UI-03053-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

EMPLOYER
Employer

**Original Claim: 12/06/09
Claimant: Respondent (1)**

Section 96.5-1 – Voluntary Quit
Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer appealed a representative's February 19, 2010 decision (reference 01) that concluded the claimant was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for April 9, 2010. The claimant participated personally. The employer also participated. The employer offered and Exhibit One was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on June 14, 2004, as a full-time general foreman. The claimant signed for receipt of the employer's handbook on January 27, 2006. The employer's drug testing policy was part of the handbook.

The handbook lists the conditions of testing for currently employed individuals. The employer could test if it has reasonable cause, if there was an accident, if the employee was found to be in possession of unauthorized substances, if an employee alters a sample or during a random selection process. Another part of the handbook submits employees to customers' unseen handbooks. The handbook indicates that rehabilitative services would be offered to employees who identify themselves as having an issue prior to selection for a test. Any employee refusing a test will be advised by the employer that their failure to cooperate would be deemed to have voluntarily quit. If they still refuse to submit to testing, the employee will be considered to have voluntarily quit work. The claimant submitted to approximately ten drug testing urinalysis during his employment. All testing was negative.

On or about January 25, 2010, the employer asked the claimant to submit to drug testing to work on a customer's property. The claimant said he thought he had been tested for the customer on November 19, 2009. The claimant commented that he would rather go through

treatment than be tested. The employer took the claimant's comments as a refusal to test. Without further comment, the employer terminated him from employment on January 25, 2010.

REASONING AND CONCLUSIONS OF LAW:

For the following reasons, the administrative law judge concludes the claimant did not voluntarily quit work without good cause attributable to the employer.

Iowa Code section 96.5-1 provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 608, 612 (Iowa 1980). The claimant had no intention to voluntarily leave work. He made comments, but never refused the test. There was no evidence presented at the hearing of any intention to quit work. The claimant did not voluntarily quit.

For the reasons that follow, the administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code section 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 proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The employer asked the claimant to submit to drug testing not covered in the employer's drug testing policy. The test was neither random or for reasonable cause. The employer regularly tests employees under other employer's standards but does not supply those standards to the employees. Even though the testing is not permitted by the handbook, the claimant had always submitted to the testing. On January 25, 2010, the employer took the claimant's comments as a refusal of testing but did not give the claimant the required warning that refusal would be considered a voluntary quit. The employer discharged the claimant and did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's February 19, 2010 decision (reference 01) is affirmed. The employer has not met its burden of proof to establish job-related misconduct. Benefits are allowed.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/kjw