

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ALAN C ROBINSON
Claimant

EXPRESS SERVICES INC
Employer

APPEAL 17A-UI-06928-NM-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 06/04/17
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 730.5 – Private Sector Drug-free Workplaces
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the June 28, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on July 26, 2017. The claimant did not participate. The employer participated through Staffing Consultant Deidra Koppes.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a general laborer from September 12, 2016, until this employment ended on November 18, 2016, when he was discharged.

Just prior to his discharge claimant had been working on assignment through the employer at Winnebago. While at work, claimant was involved in an accident. The employer's policies required drug testing for work-related accidents. Claimant provided an electronic signature acknowledging this policy on September 2, 2016, but the employer was not certain if he was ever given a copy of the policy. The employer was not sure when or how claimant was notified he would be required to submit to testing, when testing took place, or what the results were, other than he tested positive for something. The employer did not know how claimant was notified of the positive results, but thought it might have been verbally. The employer was not sure if claimant was sent a certified letter regarding the positive screen or if he was informed of his right to request a confirmatory test. Because the claimant testified positive his employment was terminated on November 18, 2016.

The claimant filed a new claim for unemployment insurance benefits with an effective date of June 4, 2017, but has not received any benefits to date. The employer participated in a fact finding interview regarding the separation on June 27, 2017. The fact finder determined claimant qualified for benefits.

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 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Department of Job Service*, 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). 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.)). In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it

incurs potential liability for unemployment insurance benefits related to that separation. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

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.” Drug screening for CDL holders in a safety sensitive position are covered by federal DOT rules. Others, such as claimant in his job as general laborer, fall under state jurisdiction; in the state of Iowa, private sector drug-free workplaces are governed by Iowa Code section 730.5. Since claimant did not have a CDL and did not drive a commercial vehicle on public roadways, he is not subject to DOT rules. 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(9) requires that a written drug screen policy be provided to every employee subject to testing. Iowa Code section 730.5(7)(i)(1) mandates if, upon a confirmed positive drug or alcohol test by a certified laboratory, a medical review officer (MRO) reports a positive test result to the employer, it must 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. 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, it has not shown it provided him a written copy of the drug testing policy, sufficient notice of the test results, or an opportunity for a split sample test according to the strict and explicit statutory requirements. Thus, the employer cannot use the results of the drug screen as a basis for disqualification from benefits. Benefits are allowed, provided claimant is otherwise eligible. The issues of participation and overpayment are moot.

DECISION:

The June 28, 2017, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. The issues of overpayment and participation are moot.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/rvs