IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

ESTHER A ALARCON Claimant **THE IOWA ODD FELLOWS & ORPHANS HM** Employer	**APPEAL 18A-UI-04976-NM-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 4/01/18** **Claimant: Appellant (2)**

Iowa Code § 96.6(2) – Timeliness of Appeal
Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the April 16, 2018, (reference 01) unemployment insurance decision that denied benefits based on her discharge for violation of a known company rule. The parties were properly notified of the hearing. A telephone hearing was held on May 16, 2018. The claimant participated and testified. The employer participated through Director of Nursing Cassidy Schmidt and Human Resource Coordinator Justina Garfin. Michael Davis was also present on behalf of the employer but did not testify. Employer's Exhibits 1 through 3 and Department's Exhibit D-1 were received into evidence.

ISSUES:

Is the appeal timely?
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: A disqualifying unemployment insurance decision was mailed to the claimant's last known address of record on April 16, 2018. The claimant's apartment number was omitted from the address and she never received the notice. On April 27, 2018, claimant went in to her local office to check on the status of the fact-finding decision. It was then that claimant first learned of the decision disqualifying her from benefits. Claimant immediately filed her appeal, which was received on April 27, 2018.

Claimant was employed full time as an LPN charge nurse from November 22, 2016, until this employment ended on March 23, 2018, when she was discharged. On February 22, 2018, someone reported to the employer that the employee restroom smelled of marijuana. The employer reviewed security footage and the only employee they saw entering the restroom during the time frame in question was claimant. By the time this was discovered claimant had left for the day and did not work again until February 26, 2018. The employer has a policy in

place, which claimant received a copy of, notifying employees they may be subject to reasonable suspicion drug testing and outlining the procedures for such testing. (Exhibit 1).

Prior to her shift on February 26, claimant was called and asked to come in early to speak with Schmidt. When claimant arrived she was informed that the employer was requesting her to take a reasonable suspicion drug test and asked to sign a testing consent form, which she did. Claimant was then escorted to the restroom by Garfin. Garfin remained present with claimant while she was providing her sample, but, at claimant's request, agreed to turn around while the sample was being provided. The testing kit utilized by the employer indicated the sample was below normal temperature range. Claimant was asked why the sample was below temperature and she responded that she did not know. Claimant was not offered an opportunity to provide a second sample. Claimant was then informed the sample would need to be sent to an independent lab for a full toxicology screen and she was being suspended pending the test results.

The employer received the toxicology report back from the lab on March 5, 2018. The report indicated marijuana had not been detected in the sample, but that the sample was dilute. (Exhibit 2). Schmidt was on vacation when the employer received the report. Schmidt and Davis generally made decisions regarding disciplinary action together. When Schmidt returned from vacation Davis left on vacation. Once Schmidt and Davis had both returned to work, they met to discuss the test results. They ultimately made the decision to discharge claimant, as they believed she had tampered with the drug test by dipping it in the toilet water. Claimant was called into work by the employer to meet with Schmidt and Davis on March 23, 2018. It was then that claimant was advised of the test results and told her employment was being terminated. (Exhibit 3). Claimant was not mailed a copy of the test results, nor was she advised of her right to have a split sample tested.

REASONING AND CONCLUSIONS OF LAW:

The first issue to be considered in this appeal is whether the appellant's appeal is timely. The administrative law judge determines it is.

Iowa Code section 96.6(2) provides:

> 2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsections 10 and 11, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs

> "a" through "h". Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The decision disqualifying claimant for benefits was mailed to her last known address on April 16, 2018. However, claimant's apartment number was left off the mailing and she did not receive a copy of the decision. The appellant did not have an opportunity to appeal the fact-finder's decision because the decision was not received. Without notice of a disqualification, no meaningful opportunity for appeal exists. See *Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973). On April 27, 2018, claimant went in to her local office to check the status of her claim. It was only then that she learned of the disqualifying decision. Claimant then immediately filed her appeal. The claimant filed an appeal within a reasonable period of time after discovering the disqualification. Therefore, the appeal shall be accepted as timely.

The next issue that must be decided is whether claimant was discharged for disqualifying misconduct. 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, regardless of the source of the individual's wage credits:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> 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.
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> 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). 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.)).

Iowa Admin. Code r. 871-24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

A lapse of 11 days from the final act until discharge when claimant was notified on the fourth day that his conduct was grounds for dismissal did not make the final act a "past act." Where an employer gives seven days' notice to the employee that it will consider discharging him, the date of that notice is used to measure whether the act complained of is current. *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988). An unpublished decision held informally that two calendar weeks or up to ten work days from the final incident to the discharge may be considered a current act. *Milligan v. Emp't Appeal Bd.*, No. 10-2098 (Iowa Ct. App. filed June 15, 2011). Inasmuch as the employer knew about the test results on March 5, 2018, but failed to notify claimant of the results or the decision to terminate her until nearly three weeks later, on March 23, 2018, the employer has not established a current or final act of misconduct. Furthermore, for the reasons discussed below, the employer failed to establish misconduct even were it current.

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.

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), but see The Court in *Sims v. HCI Holding Corp.*, 759 N.W.2d 333 (Iowa 2009), held that "[u]pon receipt

of the positive test result evidencing Sims's violation of the written drug policy, NCI was authorized to terminate Sims's employment. Iowa Code § 730.5(10)(*a*)(3). He was given verbal but not written notice of the split-sample testing opportunity. As the confirmatory retest eventually requested by Sims confirmed the initial positive result, Sims's employment was not adversely affected by an erroneous test result."

Here, the initial testing was not performed by an independent laboratory, but by the employer itself. The initial sample given was determined to be below temperature but claimant was not afforded an opportunity to provide a second sample. The sample was then sent off to an independent laboratory for confirmatory testing. The testing came back negative, but noted the sample was dilute. There was no evidence presented to suggest that the employer spoke with a medical review officer in assisting them with interpreting these results, though it relied on this conclusion, along with Garfin's observations, in determining claimant should be discharged for tampering with the test. Though the results came back negative, the testimony indicates no split sample was collected, which would have prevented claimant from requesting a second test at the laboratory of her choice in the event of a positive test result.

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. While the employer certainly may have been within its rights to test and fire the claimant, it failed to comply with multiple portions of the strict and explicit statutory requirements for reasonable suspicion drug testing. Thus, the employer cannot use the results of the drug screen as a basis for disqualification from benefits. As such, the employer has failed to meet its burden and benefits are allowed, provided claimant is otherwise eligible.

DECISION:

The April 16, 2018, (reference 01) unemployment insurance decision is reversed. The appeal is timely. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Nicole Merrill
Administrative Law Judge

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Decision Dated and Mailed

nm/rvs