

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**GREGORY G WOODLEY**  
Claimant

**APPEAL NO. 10A-UI-09541-M**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**UNITED PARCEL SERVICE**  
Employer

**OC: 04/18/10**  
**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Claimant filed an appeal from a decision of a representative dated June 29, 2010, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on August 11, 2010. Claimant participated personally and was represented by law student, Mark Simons. Employer participated by Thomas Blake, Facility Engineer. Exhibit One was admitted into evidence.

**ISSUE:**

The issue in this matter is whether claimant was discharged for misconduct.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant last worked for employer on March 29, 2010.

Claimant was discharged on March 29, 2010 by employer because claimant tested positive for alcohol after a for cause test. Claimant was observed acting in an intoxicated manner. Claimant was evaluated by an employer's representative who believed he was intoxicated. Claimant was sent to Concentra for a test. Claimant tested positive for alcohol. His tests were so high that he was considered intoxicated. A split sample was not taken or preserved based on the evidence presented. Claimant had not previously been offered substance evaluation and treatment by this employer.

Employer discharges on the first offense for positive alcohol tests over a set blood alcohol limit. Claimant was not sent a notice by certified mail of the right to have a split sample tested. Claimant was not offered substance abuse treatment or evaluation.

**REASONING AND CONCLUSIONS OF LAW:**

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.

871 IAC 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.

In this matter, the evidence fails to establish that claimant was discharged for an act of misconduct when claimant violated employer's policy concerning alcohol use and testing. Claimant was warned concerning this policy.

Iowa Code section 730.5 allows drug testing of an employee if, among other conditions, the employer has "probable cause to believe that an employee's faculties are impaired on the job." Iowa Code section 730.5(8) sets forth the circumstances under which an employer may test employees for the presence of drugs. The only applicable basis under which the employer could legitimately test claimant was reasonable suspicion. See 730.5(8)c.

The definition of "reasonable suspicion" is found at section 730.5(1)h. The employer acknowledged that there had been observations of claimant at work that would lead to the conclusion that claimant was using drugs or alcohol. The employer did cite abnormal conduct or erratic behavior while at work.

Upon a positive drug screen, Iowa Code section 730.5(3)(f) requires that an employer offer substance abuse evaluation and treatment to an employee the first time the employee has a

positive drug test for alcohol. 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 that an employer, upon a confirmed positive drug or alcohol test by a certified laboratory, notify the employee of the test results by certified mail and the right to obtain a confirmatory test before taking disciplinary action against an employee. Upon a positive drug screen, Iowa Code section 730.5(9)(g) requires, under certain circumstances, that an employer offer substance abuse evaluation and treatment to an employee the first time the employee has a positive drug 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 Employment Appeal Board, 602 N.W.2d 553, 557, 558 (Iowa 1999).

The last incident, which brought about the discharge fails to constitute misconduct because claimant was not sent notice of his rights by certified mail. This requirement is mandatory. There is no alternate method of notice allowed. In person notice of rights is not sufficient. The Iowa Courts have held that certified mail notice is mandatory. Harrison v. Employment Appeal Board, 659 NW2d 581 (IA 2003). The test was invalid due to the failure to follow Iowa law. The administrative law judge holds that claimant was not discharged for an act of misconduct and, as such, is not disqualified for the receipt of unemployment insurance benefits.

**DECISION:**

The decision of the representative dated June 29, 2010, reference 01, is reversed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

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Marlon Mormann  
Administrative Law Judge

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Decision Dated and Mailed

mdm/css