

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JAMES DAILEY
Claimant

APPEAL NO: 08A-UI-06465-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HUBBARD FEEDS INC
Employer

**OC: 06/01/08 R: 01
Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

James Dailey (claimant) appealed an unemployment insurance decision dated July 8, 2008, reference 02, which held that he was not eligible for unemployment insurance benefits because he was discharged from Hubbard Feeds, Inc. (employer) for work-related misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on July 29, 2008. The claimant participated in the hearing. The employer participated through Peg Finnegan, Human Resources Manager. Claimant's Exhibit A was admitted into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

The issue is whether the employer discharged the claimant for work-related misconduct.

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 employed as a full-time warehouse employee from January 30, 2006 through May 14, 2008 when he was suspended for a positive drug test. The rules of conduct prohibit employees from using drugs or alcohol on employer property. The employer also prohibits employees from working when under the influence of drugs or alcohol. The employer has a written drug policy that informs employees of the drug testing procedures and for which drugs the employer will be testing. The claimant was chosen for a drug test based on reasonable suspicion when his manager saw him smoking marijuana on the employer's property. The employer only allows smoking in authorized areas because of flammable products which could result in dangerous or deadly situations. The claimant was smoking in an unauthorized area. He was driven by his manager to the collection site, St. Luke's Health Services, wherein he provided a urine sample which was subsequently split. The initial results were positive for marijuana and the formal test on May 19, 2008 was also positive for marijuana. The medical review officer certified the positive results on May 22, 2008. The employer notified the claimant of the positive results by certified mail, return receipt requested. The claimant was also informed of his right to obtain a confirmatory test of the secondary sample that was taken at the time of the initial test. If he opted to do so, he had to notify the

employer of his request for a second test by certified mail, return receipt requested within seven days of the date of the positive notification letter. He also had to identify the laboratory to conduct the test and pay the fee for the test. The claimant did not elect to have a confirmatory test of the secondary sample.

The employer had a conference call with the claimant and Scott Uhrich on May 23, 2008 to discuss the positive test results. During that call, the claimant confirmed that he was smoking marijuana in an unauthorized area when Mr. Uhrich approached him on May 14, 2008. He also admitted to previously smoking marijuana and using marijuana on the employer's premises. The employer sent the claimant a letter dated June 2, 2008 in which she delineated the claimant's statements made during the conference call. The claimant was advised to contact the employer immediately if he disagreed with any point or fact stated within the letter. He was given until June 9, 2008 to contact the employer and if he failed to contact the employer, it would be understood that the facts as stated in the letter are accurate. The claimant failed to contact the employer and he was discharged on June 10, 2008 for violating the drug and alcohol policy, violating the rule which prohibits smoking in unauthorized areas and criminal conduct.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a.

Iowa Code § 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 to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant was discharged on June 10, 2008 for violating the drug and alcohol policy, violating the rule which prohibits smoking in unauthorized areas and criminal conduct. Iowa Code § 730.5 sets forth the rules by which a private company may screen its employees for use of illegal drugs. The employer has a written drug testing policy per Iowa Code § 730.5(9)(b) and tested the claimant on a random basis. The claimant was advised of the drugs to be tested. Iowa Code § 730.5(7)(c)(2). The test was performed during the workday at St. Luke's Health Services and split samples were taken at the time of collection. Iowa Code §§ 730.5(6) and (7)(a-c). A medical review officer reviewed and interpreted the confirmed positive test result. Upon receipt of the positive result, the employer notified the claimant by certified mail, return receipt requested and he was also advised of his right to obtain a confirmatory test of the secondary sample. Iowa Code § 730.5(7)(i)(1) and (2). The claimant was advised if he wanted to proceed to test the secondary sample, he needed to notify the human resources manager within seven days but he did not contact the human resources manager. The employer has complied with the requirements of Iowa Code § 730.5.

At the appeal hearing, the claimant denied he was smoking marijuana on the employer's premises on May 14, 2008 but this was the first time the employer heard this denial. The claimant contends the employer should have allowed him to continue his employment while seeking drug counseling or rehabilitation. The employer testified that the claimant was not given this option due to his criminal conduct and his violation of the no smoking policy except in designated areas. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

DECISION:

The unemployment insurance decision dated July 8, 2008, reference 02, is affirmed. The claimant is not eligible to receive unemployment insurance benefits because he was discharged from work for misconduct. Benefits are withheld until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/pjs