

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

EMILIO CRUZ
Claimant

SWIFT PORK COMPANY
Employer

APPEAL 15A-UI-13023-SC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 11/01/15
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

Emilio Cruz filed an appeal from the November 20, 2015, (reference 01) unemployment insurance decision that denied benefits based upon the determination Swift Pork Company (employer) discharged him for violation of a known company rule. The parties were properly notified about the hearing. A telephone hearing was held on December 14, 2015. The claimant participated on his own behalf. The employer participated through Human Resources Manager Stacey Santillan.

ISSUE:

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: The claimant was employed full-time as a General Laborer beginning on September 15, 2009, and was separated from employment on November 2, 2015, when he was discharged. Part of the claimant's job required him to maintain his license or certification to operate a power industrial truck or forklift. The claimant had to be drug tested annually to maintain his certification.

On October 17, 2015, the claimant voluntarily reported for his annual drug test. The onsite test was determined to be presumptively positive and the claimant's sample sent for further verification by a certified laboratory. On October 31, 2015, the test results confirmed the claimant tested positive for THC.

On November 2, 2015, the employer asked the claimant to come in for a meeting. When told about the positive result, the claimant denied being under the influence when he voluntarily submitted to the examination. The employer notified him that he was being terminated effective immediately. The employer did not send him a certified letter, return receipt requested, notifying him of his positive test result or his right to have the split-sample tested at his own expense.

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. Benefits are allowed.

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.

Iowa Admin. Code r. 871-24.32(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 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). Iowa Code § 730.5 allows drug testing of an employee in a safety sensitive position. Iowa Code § 730.5(9) requires that a written drug screen policy be provided to every employee subject to testing. Iowa Code § 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 return receipt requested, and the right to obtain a confirmatory 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 was within its rights to test and fire the claimant, it failed to provide sufficient notice of the test results and 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 and benefits are allowed.

DECISION:

The November 20, 2015, (reference 01) decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Stephanie R. Callahan
Administrative Law Judge

Decision Dated and Mailed

src/pjs