

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DAVID A GALINDO
Claimant

APPEAL NO. 12A-UI-04600-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

AADG INC
Employer

**OC: 10/30/11
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from a representative's decision dated April 13, 2012, reference 02, which held that the claimant was not eligible to receive unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on June 5, 2012. The claimant participated. The employer failed to respond to the hearing notice and did not participate.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witness and having considered all of the evidence in the record, makes the following findings of fact:

The employer manufactures wooden doors. The claimant was hired on October 26, 2007, as a full-time laborer. His last day of work was March 7, 2012.

The claimant had been suffering from anxiety and had been off work. He was prescribed some new medication to treat his anxiety. The claimant told his lead men on March 7, 2012, about the new medication. The claimant was concerned about driving the forklift. Both lead men felt that the claimant would be fine. The claimant suffered a dizzy spell while driving and hit a computer stand. He was taken to the hospital and given a urine test, which was positive for marijuana. The claimant was given a call by a physician. He was given the opportunity to test his split sample. He did not receive a certified letter from the employer nor did he receive a copy of the drug test. He found out that he was terminated when he called the employer later in the week.

The claimant did not have a copy of the employer's drug and alcohol policy. He knew by hearsay that he would be terminated for a positive urine test.

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.

Iowa Code section 730.5 provides the authority under which a private sector employer doing business in Iowa may conduct drug or alcohol testing of employees. In Eaton v. Employment Appeal Board, 602 N.W.2d 553 (Iowa 1999), the Supreme Court of Iowa considered the statute and held "that an illegal drug test cannot provide a basis to render an employee ineligible for unemployment compensation benefits." Thereafter, in Harrison v. Employment Appeal Board, 659 N.W.2d 581 (Iowa 2003), the Iowa Supreme Court held that where an employer had not complied with the statutory requirements for the drug test, the test could not serve as a basis for disqualifying a claimant for benefits. In Sims v. NCI Holding Corp, 759 N.W. 2d 333, 338 (Iowa 2009), the court held that substantial compliance with the statute was required before a drug test request or drug test may serve as a basis for disqualifying an employee for unemployment insurance benefits.

The evidence in this case failed to establish that the employer complied with the provisions of Iowa Code section 730.5. The employer did not participate in the hearing and failed to provide any evidence that the required notices were sent to the claimant following his positive drug test for marijuana. A medical review officer appears to have contacted the claimant and he was offered the opportunity to have his split sample tested. But, there is no certified notice from the employer concerning the results of the test, nor was the claimant provided a copy of the test.

The only way the claimant knew he was terminated was that he called the employer to find out his status.

Because the employer failed to show compliance with Iowa Code section 730.5, the failed test cannot be the basis for disqualification of the claimant from receiving unemployment insurance benefits. Benefits are allowed, if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated April 13, 2012, reference 02, is reversed. Unemployment insurance benefits are allowed, provided the claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/kjw