

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KEVIN M GARBER
Claimant

APPEAL NO. 13A-UI-09342-MT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OSI INDUSTRIES
OAKLAND FOODS**
Employer

OC: 07/14/13
Claimant: Appellant (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated August 5, 2013, reference 02, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on September 18, 2013. Employer participated by Ann Vorthmann, Human Resource Assistant.

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 April 23, 2013.

Claimant was discharged on May 22, 2013 by employer because claimant failed a random drug test. Claimant was informed of the policy.

He tested positive for drugs on a random drug test. Employer discharged on the first offense for positive drug tests. Claimant was sent a notice by certified mail of the right to have a split sample tested.

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 established that claimant was discharged for an act of misconduct when claimant violated employer's policy concerning drug testing. Claimant was warned concerning this policy.

Claimant was randomly selected for unannounced testing and was not tested as part of drug rehabilitation.

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 alcohol test. 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 constitutes misconduct because claimant was 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 valid as it followed Iowa law. The administrative law judge holds that claimant was discharged for an act of misconduct and, as such, is disqualified for the receipt of unemployment insurance benefits.

DECISION:

The decision of the representative dated August 5, 2013, reference 02, is affirmed. Claimant is not eligible to receive unemployment insurance benefits, until claimant meets all other eligibility requirements.

Marlon Mormann
Administrative Law Judge

Decision Dated and Mailed

mdm/css