

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LEE GENSMER

Claimant

APPEAL NO. 08A-UI-07887-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

RED GIANT OIL COMPANY

Employer

**OC: 08-03-08 R: 01
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the August 27, 2008, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on September 16, 2008. The claimant participated in the hearing. Al Foreman, Facility Manager; Roxanne Suiter, Controller/Director of Human Resources; and Kyler Underwood, Assistant Lube Plant Manager, participated in the hearing on behalf of the employer.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time lube plant worker for Red Giant Oil Company from July 23, 2007 to July 25, 2008. The claimant injured his hand at work July 22, 2008, and consequently was sent to Husker Occupational Health for a drug/alcohol test. He was given the opportunity to tell the testing facility of anything that might result in a positive test but could not think of anything. On July 24, 2008, the employer sent the claimant home and told him to return at 8:00 a.m. July 25, 2008. The lab called the claimant's home while the claimant was at lunch and the claimant called them back when he returned and was informed he tested positive for methamphetamine and should contact the employer. On July 25, 2008, the employer notified the claimant that his employment was terminated for the positive drug test.

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.

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.

The employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000). While the claimant tested positive for methamphetamine and the administrative law judge did not find his explanation that he took some of his wife's cough syrup and an over the counter cold remedy causing the positive test credible, the employer did not follow the provisions of Iowa's drug testing laws. To perform drug testing on an employee injured at work, the accident must be an OSHA reportable injury or cause property damage greater than \$1,000.00. The employer did test the claimant during work hours and paid the cost of the testing, and while it might be assumed that Husker Occupational Health provided sanitary and privacy protecting conditions and split and stored the second sample for at least 45 days, there is no proof that it did so. Additionally, the employer did not notify the claimant of the confirmed positive test by certified mail, return receipt requested, or his right to request and obtain a confirmatory test of the secondary sample at his expense by a certified lab of his choosing within seven days from the date of mailing. Consequently, while the claimant did test positive for methamphetamine and his explanation for doing so was not credible, the employer did not follow the state's drug testing law and,

therefore, the administrative law judge must conclude the employer has not met its burden of proving disqualifying job misconduct. Therefore, benefits must be allowed.

DECISION:

The August 27, 2008, reference 01, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/kjw