

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

PATRICIA L JOHNSON
Claimant

APPEAL NO: 16A-UI-10732-JE-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

KWIK TRIP INC
Employer

OC: 08/21/16
Claimant: Appellant (2)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the September 26, 2016, reference 02, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on October 17, 2016. The claimant participated in the hearing. Leroy Sisk, Assistant Store Leader, 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 part-time cashier for Kwik Trip from November 30, 2015 to August 10, 2016. She was discharged for a positive drug test.

On August 2, 2016, the employer sent the claimant to Allen Occupational Health for a random drug screen after she reported for work. The claimant's name was selected by a third party computerized program. She drove herself to Allen Occupational Health and submitted to the drug test. The claimant dropped the first specimen cup on the floor before she used it and when she turned it in, the medical personnel said the test strip would not work. Subsequently, the claimant had to provide another sample and a nurse observed her providing her second sample. Her urine sample was split upon completion. The claimant was not given the opportunity to provide information that might affect the test results either when she took the test or when she spoke to the medical review officer several days later. She was not asked what, if any, medications she was taking that might affect the outcome of the test but she did send the employer a list of her prescription and over-the-counter medications August 17, 2016. The employer did not inform the claimant of the drugs for which it tests. The employer was informed the claimant tested positive for marijuana and amphetamines August 10, 2016. The employer did not send the claimant a certified letter, return receipt requested, of her test results and her right to request a confirmatory test of the second sample. An employee has seven days from

the date of mailing of the retesting rights notice to pay for, and request, a retest. The employer's drug testing policies are in writing and it has an employee assistance program available to employees.

The employer notified the claimant her employment was terminated August 10, 2016.

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 § 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 misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). 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*, 606 N.W.2d 553 (Iowa 1999), the Supreme Court of Iowa considered the statute and held "that an illegal drug test cannot provide the 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 requirement for the drug test, the test could not serve as a basis for disqualifying a claimant for benefits.

Random drug testing is allowed provided the employees are selected by a third party company using a computer based system. While the employer followed the process provided for random testing, performed the test at the beginning of the claimant's shift, paid the costs of the initial test, provided private and sanitary conditions for the test, split the samples at the time of the collection, and provided its drug and alcohol free workplace policies to the claimant in writing, it is not clear whether it had the confirmed positive testing done by a certified laboratory before taking disciplinary action against the claimant and it did not notify the claimant of the test results by certified mail, return receipt requested, and the right to be retested to obtain a confirmatory test of the secondary sample under the appropriations of section 730.5(7)(i)(1) and (2). In addition to notifying the claimant of the test results and right to be retested, the employee must be informed that she may choose a certified lab of her own choosing, that the fee, while payable by the employee, be comparable in cost to the employer's initial test, and that the employee has seven days from the date of mailing to assert her right and request to be retested.

The Supreme Court of Iowa in the case of *Jerrie Laverne Sims v. NCI Holding Corporation, et. al*, No. 07-1468, Filed January 9, 2009, held that strict compliance with the notice provision of section 730.5, the Drug Free Workplace Statute, is required. The court held that the notice requirement within the statute focuses more directly on the protection of employees who are required to submit to drug testing and that section 730.5(7)(i)(1) accomplishes the protective purpose of the statute by mandating written notice by certified mail of (1) any positive drug test, (2) the employee's right to obtain a confirmatory test, and (3) the fee paid by the employee to the employer for reimbursement of the expense of that test. The court held that such a formal notice conveys to the addressee "a message that the contents of the document are important and worthy of the employee's deliberate reflection." In deciding whether a substantial compliance has taken place, the court cited *Harrison v. Employment Appeal Board*, 659 N.W.2d 581, 586 (Iowa 2003) in stating "although an employer is entitled to have a drug free workplace, it would be contrary to the spirit of Iowa's drug testing law if we were to allow employers to ignore the protections afforded by this statute..."

The court concluded that the verbal notice provided by NCI at the time of Sims' termination regarding the right to have the testing of the sample was insufficient to convey to Sims all of the employee protections afforded by section 730.5(7). The court held that although Sims was verbally informed of the right to undertake a confirmatory test, the verbal notice was incomplete and failed to adequately convey the message that the notice was important. It was noted that a written notice sent by certified mail conveys the importance of the message and the need for deliberate reflection. The court further held that NCI did not come into substantial compliance with the statutory obligation under section 730.5(7) when it sent a written notice to Sims several months after he was discharged. The court concluded that verbal notice provided at that time of termination was insufficient to convey to Sims all of the employee protections afforded by section 730.5(7). It held that although the verbal notice informed the employee of his right to take a confirmatory test, the verbal notice was incomplete and did not adequately convey the message the notice was important.

In view of the strict position taken by the Iowa Supreme Court in the *Sims* case, the administrative law judge concludes that the employer in this case did not establish strict compliance with section 730.5 of the Drug Free Workplace Statute. Because the employer's notice to the claimant of the positive test did not comply with Iowa Code section 730.5, the test was not authorized by law and cannot serve as the basis for disqualifying the claimant from unemployment insurance benefits. Based upon the evidence in the record and the application

of the appropriate law, the administrative law judge must conclude that the claimant was discharged for no disqualifying reason. Accordingly, benefits are allowed.

DECISION:

The September 26, 2016, reference 02, 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/rvs