

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**STEVE F KAISER**  
Claimant

**EXPRESS SERVICES INC**  
Employer

**APPEAL 19R-UI-09578-S1-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 08/25/19**  
**Claimant: Appellant (2)**

Iowa Code § 96.5-2-a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Steve Kaiser (claimant) appealed a representative's September 17, 2019, decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits after his separation from work with Express Services (employer). This administrative law judge issued a decision on October 22, 2019, affirming the representative's decision. A decision of remand was issued by the Employment Appeal Board on December 3, 2019. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for January 7, 2020. The claimant was represented by Todd Schmidt, Attorney at Law, and participated personally. The employer participated by Carrie Cannon, Lead Industrial Recruiter. The employer offered and Exhibit One was received into evidence.

**ISSUE:**

The issue is whether the claimant was separated from employment for any disqualifying reason.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The employer is a staffing agency. Claimant worked for the employer on various temporary assignments starting in 2005. His last assignment was at Hormel where he worked as a full-time packager from May 1, 2019, to August 13, 2019. He signed for receipt of the employer's Drug and Alcohol Policy Statement and Consent Form on April 20, 2018.

The policy was in writing and the claimant received a copy. It did not list the drugs for which the employer could test or identify any discipline for testing positive. It did state, "I understand that if, after being assigned to a job, I am convicted of any drug statute violation, including a plea of guilty or no contest, for an occurrence on or off Express or client premises or job location, I am to notify my Express supervisor within five (5) days of the conviction. Failure to do so will be grounds for disciplinary action up to and including termination as an Express associate". This was the only terminable offense in the policy.

The policy stated that the employer could require drug screening for pre-employment/post-offer testing, reasonable suspicion/for cause testing, and post-accident/incident testing. On August 13, 2019, the claimant was injured at work. On August 14, 2019, the claimant notified the employer when he recognized the injury. He did not work that day but was directed to seek

medical attention. In the course of his treatment, a urine sample was collected. The claimant was not certain the sample was taken for testing purposes. He was not questioned about any drugs he was taking that might affect the results of the testing. He did not see any indication of a split sample.

On or about August 21, 2019, a person telephoned the claimant with results of the testing. The claimant was not questioned by the person about any drugs he was taking that might affect the results of the testing. The person told him he could pay to have a second test performed but did not tell the claimant the cost of the second test. The claimant thought it would be expensive and refused another test.

That same day the employer received a call saying the claimant tested positive. The employer called the claimant and terminated him. Neither the employer nor the claimant ever saw a paper copy of the test results.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The claimant was terminated for violating the employer's drug policy. While the employer is entitled to perform drug testing after an injury in some cases, 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 at 558.

In this case, the employer's Drug and Alcohol Policy does not meet the guidelines of the law. Iowa Code Section 730.5(7)c(2) requires that an employer provide employees and prospective employees a list of drugs to be tested. No such list was present in the employer's policy. Iowa Code Section 730.5(1)i(5) states that a reasonable suspicion drug or alcohol test may be required if an employee caused an accident while working and that accident resulted in injury to a person that could be reported under chapter 88 or resulted in \$1,000.00 in property damage. The employer's policy does not reflect the language of the Iowa Code.

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. The employer failed to give the claimant notice of the test results according to the strict and explicit statutory requirements and failed to allow him an opportunity for evaluation and treatment. Benefits are allowed, provided the claimant is otherwise eligible.

**DECISION:**

The representative's September 17, 2019, decision (reference 01) is reversed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

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Beth A. Scheetz  
Administrative Law Judge

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Decision Dated and Mailed

bas/scn