

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LEVI R MEYER
Claimant

APPEAL NO. 08A-UI-11068-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

MENARD INC
Employer

OC: 05-25-08 R: 01
Claimant: Respondent (1)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the November 17, 2008, reference 05, decision that allowed benefits. After due notice was issued, a hearing was held on December 17, 2008. The claimant did participate. The employer did participate through Michael Muhlbauer, Assistant General Manager and was represented by William Kelly, Attorney at Law. Employer's Exhibits One through Five were entered and received.

ISSUE:

Was the claimant discharged for work-related misconduct?

FINDINGS OF FACT:

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: Claimant was employed as an outside yard worker full time beginning June 17, 2008 through October 20, 2008 when he was discharged.

The claimant sustained a work-related injury on October 8, 2008 and was sent for medical treatment. Because he was injured on the job the claimant was subjected to a drug test per the employer's policy, a copy of which was given to the claimant. The employer was notified of the claimant's positive drug test for marijuana on October 20, 2008. The claimant was verbally told by Mr. Muhlbauer that he had tested positive for marijuana and that due to the test results he was being discharged. There is no evidence that the claimant was ever notified by certified mail of his positive test results and that he had the right to have the split sample tested at his own cost.

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.

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 job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982).

Iowa Code § 730.5(9) requires that a written drug screen policy be provided to every employee subject to testing. Iowa Code § 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 § 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 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 another test even if a split sample was taken. Thus, employer cannot use the results of the drug screen as a basis for disqualification from benefits. Benefits are allowed.

DECISION:

The November 17, 2008, reference 05, decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/css