

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JODIE L AGAN
Claimant

APPEAL NO. 14A-UI-11181-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DURHAM D & M LLC
Employer

OC: 12/29/13
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Claimant filed a timely appeal from a representative's decision dated October 14, 2014, reference 01, which denied unemployment insurance benefits. After due notice was provided, a telephone hearing was held on November 17, 2014. Claimant participated. The employer participated by Mr. Curtis Wheeler, Manager.

ISSUE:

The issue is whether the claimant was discharged for misconduct in connection with her work.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Jodie Agan was employed by Durham D & M LLC doing business as Durham School Services from June 2010 until September 9, 2014 when she was discharged from employment. Ms. Agan was employed as a part-time school bus driver averaging 20-25 hours of work per week and was paid by the hour. Her immediate supervisor was Curtis Wheeler, Terminal Manager.

On August 29, 2014, Ms. Agan was involved in a backing accident while operating a company school bus for Durham School Services. The claimant backed into a grassy area causing approximately \$200 in damage to the bus' exhaust system. Because the accident had taken place off of Durham School Services property, company policy required that the claimant undergo drug testing.

Ms. Agan was required to submit a urine sample for analysis at a collection site and the split sample was properly maintained and identified. The sample was sent to a certified medical laboratory for analysis. The claimant was contacted by a Medical Review Officer and subsequently Durham School Services was informed by the Medical Review Officer of a positive test result for marijuana in the test sample in excess of the cutoff level allowed. Ms. Agan was informed of the positive test results verbally by the terminal manager and was not informed of the positive test results in any other manner.

It is Ms. Agan's position that she inadvertently may have consumed some marijuana "treats" at a bachelorette party that she had attended days before the testing and that she did not intend to violate the company's substance abuse policies.

REASONING AND CONCLUSIONS OF LAW:

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 proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. Misconduct that may be serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant the denial of unemployment insurance benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. of Appeals 1992).

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. Iowa Employment Appeal Board, 602 N.W.2d 553 (Iowa 1999), the Supreme Court of Iowa considered the statute and held "that an illegal drug test cannot provide a basis to render an

employee ineligible for unemployment compensation benefits.” Thereafter, in Harrison v. Employment Appeal Board, 659 NW 2d 581 (Iowa 2003), the Iowa Supreme Court held that where an employer had not complied with the statutory requirements for the drug test, the test could not serve as a basis for disqualifying a claimant for benefits.

In the present case, the employer chose to require drug testing from Ms. Agan solely because a driving accident she was involved with did not take place on Durham School Services property. The employer’s policy failed to comply with Iowa Code section 730.5 which allows employers to conduct reasonable suspicion drug or alcohol testing, for perspective employees or testing as required by Federal law that limits drug and alcohol testing investigating accidents unless the accident results in injury to a person or results in damage to company property including equipment in an amount reasonably estimated at the time of the accident to exceed \$1,000.00.

The employer’s policy also failed to comply with Iowa Code section 730.5 because the employer chose to notify the claimant of the positive test results verbally. Section 730.5 requires that if a confirmed positive test results for drug or alcohol for a current employee it is reported to the employer by the Medical Review Officer and the employer shall notify the employee in writing by certified mail, return requested of the results of the test, the employee’s right to request and obtain a confirmatory test of the second sample and the fee payable by the employee to the employer for reimbursement of expenses concerning the test.

For the above-stated reasons the administrative law judge concludes that the employer’s drug testing policy was not in compliance with the statute requirement of 730.5 and the test cannot serve as a basis for disqualifying this claimant for benefits. Accordingly, the administrative law judge concludes that the claimant was discharged under non disqualifying conditions. Unemployment insurance benefits are allowed, provided the claimant meets all other eligibility requirements of Iowa law.

DECISION:

The representative’s decision dated October 14, 2014, reference 01, is reversed. Claimant was discharged under non disqualifying conditions. Unemployment insurance benefits are allowed, providing the claimant is otherwise eligible.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs