

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

KIM C SCHMELZER
Claimant

APPEAL 21A-UI-01387-S2-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

NORTH CEDAR TRUCKING LLC
Employer

OC: 08/30/20
Claimant: Appellant (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 730.5 – Private Sector Drug-free Workplaces

STATEMENT OF THE CASE:

The claimant filed an appeal from the December 3, 2020, (reference 01) unemployment insurance decision that denied benefits based upon a discharge due to failure to follow instructions. The parties were properly notified of the hearing. A telephone hearing was held on February 18, 2021. The claimant Kim C. Schmelzer participated and testified. The employer North Cedar Trucking participated through owner Diane Poduska, office manager Holly Poduska, and road supervisor Mike Haun. Employer's Exhibits 1, 2, 3, and 4 were admitted into the record.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a driver from July 18, 2018, until this employment ended on September 2, 2020, when he was discharged.

Employer has a drug and alcohol policy. The policy states that being under the influence of drugs or alcohol is not permitted at work and that an employee can be tested for drugs and alcohol after being involved in an accident or based upon reasonable suspicion. Claimant was aware of the policy. (Employer's Exhibit 4)

Claimant submitted to a drug screen at a certified laboratory on July 14, 2020, because of periodic random testing. On July 15, 2020, employer sent a letter to claimant by certified mail notifying him that his urine sample tested positive for marijuana and giving him the opportunity to have a split sample of his urine tested. Claimant did not request that the split sample be tested. Employer referred claimant to a substance abuse counselor. Employer informed claimant that he would not be permitted to return to work until he completed the program.

Claimant admitted to taking THC, but stated it was found in the CBD he took for his hip pain.

On September 2, 2020, employer discharged claimant for violating its zero-tolerance drug policy.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); accord *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000).

The employer has the burden of proving disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). Whether an employee violated an employer's policies is a different issue from whether the employee is disqualified for misconduct for purposes of unemployment insurance benefits. See *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000) ("Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits." (Quoting *Reigelsberger*, 500 N.W.2d at 66.)).

Employer based its decision to suspend claimant on a drug test that was positive for marijuana based on a period random test. Testing under Iowa Code section 730.5(4) allows employers to test employees for drugs and/or alcohol but requires the employer “adhere to the requirements . . . concerning the conduct of such testing and the use and disposition of the results.” Testing shall include confirmation of initial positive test results. For breathalyzer testing, initial and confirmatory testing may be conducted pursuant to the employer’s written policy. A policy shall include requirements governing breath testing devices, alcohol screening devices, and qualifications for administering personnel consistent with DOT rules. If an oral fluid sample is taken and results are received in the presence of the employee, this is considered a sufficient sample for split sample testing. Iowa Code § 730.5(7)f.

Iowa Code section 730.5(10)(a)(1) provides that the employer may require that the employee enroll in an employer-provided or approved rehabilitation, treatment, or counseling program, which may include additional drug or alcohol testing, participation in and successful completion of which may be a condition of continued employment, and the costs of which may or may not be covered by the employer’s health plan or policies.

The employer has met the requirements of Iowa Code section 730.5. Claimant did receive a copy of employer’s drug and alcohol use policy, he was tested at a certified testing facility by random sample on July 14, 2020, the drug screen was positive for THC, claimant was notified by certified mail and offered a split screen sample, and he did not request a second test of the split sample. Employees are required to be drug free in the workplace. The violation of the known work rule and DOT regulations constitutes misconduct as it presents a safety hazard to the employee and the general public and potential liability for employer. For these reasons, employer has met its burden to prove it discharged claimant for misconduct under Iowa law. Benefits are denied.

DECISION:

The December 3, 2020, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.



Stephanie Adkisson
Administrative Law Judge
Unemployment Insurance Appeals Bureau
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax (515)478-3528

March 2, 2021
Decision Dated and Mailed

sa/mh

Note to Claimant: This decision determines you are not eligible for regular unemployment insurance benefits. If you disagree with this decision you may file an appeal to the Employment Appeal Board by following the instructions on the first page of this decision. Individuals who do not qualify for regular unemployment insurance benefits due to disqualifying separations, but who are currently unemployed for reasons related to COVID-19 may qualify for Pandemic Unemployment Assistance (PUA). **You will need to apply for PUA to determine your eligibility under the program.** Additional information on how to apply for PUA can be found at <https://www.iowaworkforcedevelopment.gov/pua-information>.