

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

**CAROL J BENNETT-LEMME**  
Claimant

**APPEAL NO. 18A-UI-07799-S1-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**SWIFT PORK COMPANY**  
Employer

**OC: 06/10/18**  
**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Carol Bennett-Lemme (claimant) appealed a representative's July 11, 2018, decision (reference 01) that concluded she was not eligible to receive unemployment insurance benefits after her separation from employment with Swift Pork Company (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for August 13, 2018. The claimant participated personally. The employer participated by Chelsea Cornelius, Human Resources Manager.

**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 claimant was hired on April 24, 2017, as a full-time production worker. She signed for receipt of the employer's handbook on April 26, 2017. It contained the employer's drug and alcohol policy. The policy allows for testing before licensure, post-accident, and under reasonable suspicion. The policy does not mention confirmatory testing or notification of testing results.

The employer issued the claimant a written warning on April 29, 2017, for having a food item on the production floor. It issued her a three-day suspension on January 9, 2018, for a food safety violation. The employer notified the claimant each time that further infractions could result in termination from employment.

On March 26, 2018, the claimant worked without leaving the production floor. A supervisor took the claimant to the nurse's area to provide a urine sample. The employer did an initial test on the sample and then sent it to an offsite laboratory for reasonable suspicion testing. The claimant was taken to see the human resources manager. This was the first time the claimant met him. The manager and an unknown employee wrote a statement saying there was an odor of marijuana. The claimant was suspended pending the results of the testing. A laboratory contacted the claimant and discussed the positive results of the test. It did not offer her any

information about a confirmatory test. The employer sent the claimant a letter of termination on April 5, 2018. The claimant did not receive it.

### **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).

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 Section 730.5(1)i(5) states that a reasonable suspicion drug or alcohol test is based upon evidence that an employee is using or has used drugs in violation of the employer's written policy. This evidence must be drawn from specific objective and articulable facts and reasonable inferences drawn from those facts in light of experience. The Iowa Code lists examples of what these may be based upon. Those examples include, but are not limited to, abnormal conduct, erratic behavior, an observation of direct use of the substance, tampering with a drug/alcohol test, or physical impairment. In this case, the manager reported an odor of marijuana on March 26, 2018. The

claimant was tested before the manager came in contact with the claimant and the odor was not identified as coming from the claimant. The identity of the other person who made a statement is unknown. The employer has failed to prove there was a valid reasonable suspicion because the person who had the suspicion did not meet the claimant until after the testing. 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.

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 never sent the results to the claimant. The employer failed to give the claimant notice of the test results according to the strict and explicit statutory requirements. Benefits are allowed, provided the claimant is otherwise eligible.

**DECISION:**

The representative's July 11, 2018, decision (reference 01) is reversed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

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Beth A. Scheetz  
Administrative Law Judge

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Decision Dated and Mailed

bas/rvs