

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DELILAH R MALY
Claimant

APPEAL NO. 10A-UI-02863-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SEVENTH AVENUE INC
Employer

OC: 02/08/09
Claimant: Respondent (1)

Section 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

Seventh Avenue, Inc. filed an appeal from a representative's decision dated February 15, 2010, reference 03, which held that no disqualification would be imposed regarding Delilah Maly's separation from employment. After due notice was issued, a hearing was held by telephone at 3:00 p.m. on April 6, 2010. The employer participated by Lynn Rankin, Assistant Human Resources Manager. Exhibits One through Five were admitted on the employer's behalf.

Ms. Maly responded to the notice of hearing but was not available at the number provided at the scheduled time of the hearing. A message was left for her at 3:02 p.m. She did not contact the Appeals Bureau until 3:29 p.m., after the hearing record was closed. She indicated she was off work at 3:03 p.m. She could offer no viable explanation as to why she delayed contacting the Appeals Bureau until almost 3:30 p.m. Because Ms. Maly did not establish good cause for not participating at the scheduled time, the administrative law judge declined to reopen the hearing record.

ISSUE:

At issue in this matter is whether Ms. Maly was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

Having heard the testimony and having reviewed all of the evidence in the record, the administrative law judge finds: Ms. Maly began working for Seventh Avenue, Inc. on August 25, 2009 as a full-time manifest operator. In early January of 2010, she was selected for promotion to a supervisory position and, therefore, was required to undergo a drug screen.

The employer conducted drug screening on January 11 and received the results on January 15. The employer met with Ms. Maly on January 15 and advised her that she had tested positive for marijuana. She was given a letter that confirmed the fact that she was being discharged for testing positive for marijuana. The letter advised that she had the right to have a split of her original specimen tested at an approved lab of her choice. Although the letter stated that she

would be responsible for “all expenses incurred,” it did not specify the actual costs of the testing. Ms. Maly did not request that a split be tested.

REASONING AND CONCLUSIONS OF LAW:

An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Ms. Maly was discharged for violating the employer’s drug and alcohol policy when she tested positive for marijuana. In order for drug testing results to form the basis of a misconduct disqualification, the testing must be conducted in conformance with Iowa’s drug testing laws. See Eaton v. Iowa Employment Appeal Board, 602 N.W.2d 553 (Iowa 1999). This requirement applies to not only the testing itself but also to post-testing procedures. See Harrison v. Employment Appeal Board, 659 N.W.2d 581 (Iowa 2003).

An employer is required to notify an individual by certified mail, return receipt requested, of positive drug test results. Iowa Code section 730.5(7)i(1). Even if the administrative law judge were to conclude that hand-delivering the notice to Ms. Maly constituted substantial compliance with the requirements of the law, the notice was flawed in at least one other respect. The notice did not advise her of the cost of having a split tested as required by section 730.5(7)i(1). The purpose of the statute is to provide the employee with sufficient information to make an informed choice regarding further testing.

The fact that the employer told Ms. Maly that she would be responsible for “all expenses incurred” in the second testing was not sufficient to put her on notice as to the costs of having the testing done. She was not required to ask about the costs; the employer was required to notify her of the costs. Because the employer did not fully and substantially comply with the post-testing requirements of Iowa’s drug testing law, the results cannot be used to disqualify Ms. Maly from receiving benefits.

DECISION:

The representative’s decision dated February 15, 2010, reference 03, is hereby affirmed. Ms. Maly was discharged but disqualifying misconduct has not been established. Benefits are allowed, provided she is otherwise eligible.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/pjs