

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JEREMY P VAN HAUEN
Claimant

EXPRESS SERVICES INC
Employer

APPEAL 17A-UI-13116-JP-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 11/26/17
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the December 12, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on January 11, 2018. Claimant did not register for the hearing and he did not participate. Employer participated through staffing consultant Jim Cole. Official notice was taken of the administrative record with no objection.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a general laborer from February 16, 2017, and was separated from employment on September 3, 2017, when he was discharged for failing a post-accident drug screen.

The employer is a staffing agency. Claimant had twelve assignments during his employment. On August 22, 2017, claimant was involved in an accident at work while on assignment at Casting Cleaning. As a result of the accident claimant was treated for his injury (abrasion) at Arrowhead Medical Center. While claimant was receiving treatment, Arrowhead Medical Center requested claimant perform a post-accident drug screen. The employer has a written drug and alcohol use policy. Claimant received a copy of employer's drug and alcohol use policy. Claimant signed a receipt for the policy on January 23, 2017. The employer's drug and alcohol use policy provides for uniform standards for actions that are taken in case of a confirmed positive test. Claimant submitted to a drug screen at a certified laboratory on August 22, 2017, because of a post-accident incident. Claimant's drug screen results were positive and in

violation of the employer's policy. The employer did not provide the drug screen results to claimant by certified mail with return receipt. A medical review officer (MRO) informed claimant of the results by telephone. Claimant was not offered a split sample test. Mr. Cole is not aware if claimant's initial sample was split into two components. On September 7, 2017, the MRO notified the employer about claimant's positive drug screen results. On September 7, 2017, the employer told claimant he was discharged due to the positive drug screen result. Claimant was not offered a confirmatory test of a second sample.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

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). 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.)). 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. Iowa Code section 730.5(7)(b) requires “[c]ollection of a urine sample for testing of current employees shall be performed so that the specimen is split into two components at a the time of collection in the presence of the individual from who the sample or specimen is collected.” Iowa Code section 730.5(7)(b) further requires that “[t]he second portion of the specimen or sample shall be of sufficient quantity to permit a second, independent confirmatory test[.]” Iowa Code section 730.5(7)(i)(1) mandates that “[i]f a confirmed positive test result for drugs or alcohol for a current employee is reported to the employer by the medical review officer, the employer shall notify the employee in writing by certified mail, return receipt requested, of the results of the test, the employer’s right to request and obtain a confirmatory test of the second sample collected pursuant to paragraph “b” at an approved laboratory of the employee’s choice, and the fee payable by the employee to the employer for reimbursement of expenses concerning the test.” Iowa Code section 730.5(7)(i)(1).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy. While the employer certainly may have been within its rights to test and discharge claimant, it failed to provide him sufficient notice of the test results by certified letter, return receipt requested. See Iowa Code section 730.5(7)(i)(1). The employer also failed to provide claimant an opportunity to obtain a confirmatory test of the second split sample according to the strict and explicit statutory requirements. See Iowa Code section 730.5(7)(i)(1). Furthermore, no evidence was presented that claimant’s urine sample was split into to two components. See Iowa Code section 730.5(7)(b). 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 Emp’t Appeal Bd.*, 602 N.W.2d 553, 557, 558 (Iowa 1999). Therefore, the employer cannot use the results of the drug screen as a basis for disqualification from benefits. As such, the employer has failed to establish disqualifying job misconduct. Benefits are allowed.

DECISION:

The December 12, 2017, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/rvs