

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

WILLIAM TIGGES
Claimant

APPEAL NO: 09A-UI-02481-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

PREMIER TOOLING INC
Employer

OC: 01/18/09
Claimant: Appellant (1)

Section 96.5-2-a - Discharge for Misconduct

STATEMENT OF THE CASE:

William Tigges (claimant) appealed an unemployment insurance decision dated February 12, 2009, reference 01, which held that he was not eligible for unemployment insurance benefits because he was discharged from Premier Tooling, Inc. (employer) for work-related misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 11, 2009. The claimant participated in the hearing. The employer participated through Mark Geistkemper, Operations Manager and Paul Menster, Production Manager. Employer's Exhibits One through Three were admitted into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

The issue is whether the employer discharged the claimant for work-related misconduct.

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 employed as a full-time press operator from May 1 2008 through January 14, 2009. He was discharged after he tested positive for marijuana in a post-accident drug test taken on December 31, 2008. The employer has a written drug policy which the claimant received on May 1, 2008. The Premier Tooling and Manufacturing, Inc. Reasonable Suspicion and Post-Accident Drug Testing Policy prohibits an employee from using, possession, distributing, selling, conveying, manufacturing, and being under the influence of controlled substances while conducting business-related activities on or off company property. Refusal to submit to a drug test and/or a positive test result results in termination.

The policy provides the following protections to insure the accuracy and the integrity of the testing program:

- A. All urine specimens collected under this policy will be submitted to a laboratory approved under rules adopted by the Iowa Department of Public Health.

- B. A strict chain of custody procedure will be used to ensure the integrity of each urine specimen test results.
- C. The process will ensure individuals privacy during the collection process, and every attempt will be made to keep the testing process confidential. However those employees or witnesses who may have knowledge of the incident or accident may be contacted as the situation warrants.
- D. A split specimen will be split into two components in the presence of the individual providing the specimen and labeled accordingly.
- E. An employee is welcome to provide any information that may be considered relevant to the test, including but not limited to, identification of prescription or nonprescription drugs currently or recently used.

The policy further provides that any employee testing positive for a controlled substance will be allowed a second confirmatory test which may be done at any approved laboratory of the employee's choice. The employee is required to prepay a fee in order to have the second confirmatory test performed at a rate which is consistent with the employer's cost for conducting the initial test. The employee has seven days, from the date the employer mails a written notice to the employee of the results, to obtain the second confirmatory test.

The Medical Review Officer notified the claimant of his positive result on January 5, 2009. The employer also learned about the positive results on January 5, 2009 but called the claimant to the office on January 6, 2009. The employer did not send the claimant a certified letter, return receipt requested, which informed him of his results. However, the employer provided the claimant with written notification of his positive drug test for marijuana on January 6, 2009 and the claimant signed for its receipt. The written notice confirms that the drug policy was explained to him. Based on the employer's policy, the claimant opted to have the split sample retested and was suspended in the interim. The split sample retested positive for marijuana and the claimant and employer were notified of the positive results on January 13, 2009 by Finley Occupational Health Clinic. The claimant was discharged on January 14, 2009 for violation of the employer's drug policy.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a.

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.

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.

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant was discharged for violation of the employer's drug and alcohol policy due to his positive drug test for marijuana. Iowa Code § 730.5 sets forth the rules by which a private company may screen its employees for use of illegal drugs. The employer has a written drug testing policy per Iowa Code § 730.5(9)(b) and tested the claimant in a post-accident drug test. The test was performed during the workday at the Finley Hospital Occupational Health Clinic and split samples were taken at the time of collection. Iowa Code §§ 730.5(6) and (7)(a-c). A medical review officer reviewed and interpreted the confirmed positive test result and notified the claimant of the positive results before reporting the results to the employer; Iowa Code § 730.5(7)(g). The claimant was notified in writing of the positive result and of his right to obtain a confirmatory test of the secondary sample. Iowa Code § 730.5(7)(i)(1) and (2). The claimant elected to have the split sample retested and the split sample also tested positive for marijuana on January 13, 2009.

The Iowa Supreme Court has ruled that an employer cannot establish disqualifying misconduct based on a drug test performed in violation of Iowa's drug testing laws. Harrison v. Employment Appeal Board, 659 N.W.2d 581 (Iowa 2003); Eaton v. Employment Appeal Board, 602 N.W.2d 553, 558 (Iowa 1999). As the court in Eaton stated, "It would be contrary to the spirit of chapter 730 to allow an employer to benefit from an unauthorized drug test by relying on it as a basis to disqualify an employee from unemployment compensation benefits." Eaton, 602 N.W.2d at 558.

However, in a more recent case the Court has held that an employer's substantial compliance, "compliance in respect to essential matters necessary to assure the reasonable objectives of the statute", is all that is required. Sims v. NCI Holding Corporation, No. 07-1468 (Iowa 1/9/2009) (Iowa 2009). In the case herein, the only action the employer failed to do was to send a certified letter to the claimant. However, written notice was provided and the claimant was made aware of his rights to retest the split sample, since he had that done. Consequently, the administrative law judge concludes the employer was in sufficient compliance with Iowa Code § 730.5 in respect to essential matters necessary to assure the objectives of the statute. The claimant's violation of the employer's drug policy shows a willful or wanton disregard of the

standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. The employer discharged the claimant for reasons amounting to work-connected misconduct and benefits are denied.

DECISION:

The unemployment insurance decision dated February 12, 2009, reference 01, is affirmed. The claimant is not eligible to receive unemployment insurance benefits because he was discharged from work for misconduct. Benefits are withheld until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/pjs