

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JUSTIN GEARHART**  
Claimant

**APPEAL NO. 07A-UI-06972-ET**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**H & H TRAILER COMPANY**  
Employer

**OC: 06-17-07 R: 01  
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge/Misconduct

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the July 16, 2007, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on August 1, 2007. The claimant did not respond to the hearing notice and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. Kenny Porter, Plant Manager, participated in the hearing on behalf of the employer. Employer's Exhibits One and Two were admitted into evidence.

**ISSUE:**

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

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time painter for H & H Trailer Company from June 4, 2007 to June 11, 2007. The employer's policy requires a pre-employment drug screen and physical and states the employer is "only working for H&H Trailer Company...temporarily pending the results of my drug test and physical. Upon negative drug test/physical results, I understand that I will become a full time employee of H&H Trailer...I also understand that the cost (\$100.00) of the pre-employment physical and drug screen will be deducted from my first paycheck. After successful completion of 90 days of working at H&H I will be reimbursed the charge on the first paycheck after 90 days of employment" (Employer's Exhibit One). The claimant took the drug test and physical during work hours at the Clarinda Hospital June 8, 2007. The employer does not know the details of the testing procedure beyond that it was a urine test. On June 11, 2007, the employer was notified the claimant tested positive for marijuana and told the claimant verbally of the results and that his employment was terminated (Employer's Exhibit Two). He was told he could have the split sample tested at his own expense. The employer does not have a written drug testing policy.

## REASONING AND CONCLUSIONS OF LAW:

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

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.

The employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000). While the claimant did test positive for marijuana, the employer did not follow the provisions of Iowa's drug testing laws. The employer did test the claimant during work hours and paid the costs upfront but also required the claimant to repay the costs of the test because the drug screen was positive. Employers are responsible for paying all the costs of the drug screen, excluding the costs of testing the secondary sample. Although it might be assumed that the Clarinda Hospital conditions were sanitary and private, that they split and stored the required amount of the sample for 45 days, that the claimant was given an opportunity to provide information that might affect test results and that the employee was notified of the drugs to be tested for, there is no proof that any of these procedures were followed. Additionally, the employer did not notify the

claimant of the confirmed positive test result by certified mail, return receipt requested, or his right to request and obtain a confirmatory test of the secondary sample at his expense by a certified lab of his choosing within seven days from the date of the mailing as required by law. Consequently, while the claimant did test positive for marijuana, the employer did not follow the state's drug testing law and, therefore, the administrative law judge must conclude the employer has not met its burden of proving disqualifying job misconduct and benefits must be allowed.

**DECISION:**

The July 16, 2007, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

---

Julie Elder  
Administrative Law Judge

---

Decision Dated and Mailed

je/kjw