

**IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI**

**SCOTT KELLEN  
36361 – 150<sup>TH</sup>  
LEMARS IA 51031**

**DEN HARTOG INDUSTRIES INC  
4010 HWY 60 BLVD  
PO BOX 425  
HOSPERS IA 51238**

**RICHARD STURGEON  
WORKERS' ADVOCATE  
WORKERS HAVE RIGHTS TOO  
P O BOX 3372  
SIOUX CITY IA 51102-3372**

**Appeal Number: 05A-UI-02313-S2T  
OC: 01/30/05 R: 01  
Claimant: Appellant (2)**

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4<sup>th</sup> Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Scott Kellen (claimant) appealed a representative's February 25, 2005 decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits because he was discharged from work with Den Hartog Industries (employer) for violation of a known company rule. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 21, 2005. The claimant was represented by Richard Sturgeon, Workers' Advocate, and participated personally. The employer participated by Marilyn Trefz, Human Resources Manager, and Jon Dykstra, Plant Manager. The claimant offered one exhibit which was marked for identification as Exhibit A. Exhibit A was received into evidence.

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 August 9, 2004, as a full-time oven/finishing operator. The claimant received a copy of the employer's handbook and signed for its receipt on August 9, 2004. The handbook contains the employer's drug policy. The claimant sustained an injury at work and was, therefore, required to undergo testing for the presence of drugs.

The claimant supplied a sample on January 20, 2005. On January 27, 2005, the claimant tested positive for amphetamines. The employer terminated the claimant on January 27, 2005.

On January 28, 2005, the claimant received a certified letter from the employer notifying him that his sample submitted for drug and/or alcohol test was positive. The letter did not specify for what the claimant tested positive. The letter gave the claimant the opportunity to have a confirmatory retest.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 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(9) requires that a written drug screen policy be provided to every employee subject to testing. 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. Upon a positive drug screen, Iowa Code section 730.5(9)(g) requires, under certain circumstances, that an employer offer substance abuse evaluation and treatment to an employee the first time the employee has a positive drug test. 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.

The employer took disciplinary action before affording the claimant the notification requirements as mandated by Iowa Code Section 730.5(9)(c). Benefits are allowed.

DECISION:

The representative’s February 25, 2005 decision (reference 01) is reversed. The claimant was discharged. Misconduct has not been established. Benefits are allowed provided the claimant is otherwise eligible.

bas/s