

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: Valerie D. Porter was employed by Wal-Mart Stores, Inc. stores from July 20, 2004 until she was discharged March 11, 2005. She worked as a sales floor associate.

In late February, co-workers reported to store management that Ms. Porter had stated that she had passed the company's pre-employment drug screen by using her daughter's urine. They also reported that Ms. Porter was hyperactive, urinated often, and had asked a vendor for money on one occasion. The employer found these reports to constitute reasonable suspicion of drug use. Pursuant to its written policy, the employer scheduled a drug test for Ms. Porter. Ms. Porter was not given a list of the substances for which she was being tested. A split sample of urine was collected.

The employer's laboratory notified the employer that the sample had tested positive for marijuana. The laboratory had confirmed by a gas chromatography/mass spectrometry test. On March 8, 2005 the employer sent a certified letter to Ms. Porter. It advised her of the positive test. The letter instructed Ms. Porter to contact the medical review officer within 24 hours of her receipt of the letter. It stated that failure to comply with the request would result in immediate termination of her employment. Ms. Porter, who had not received any prior calls from the medical review officer, called the number provided by the employer. The medical review officer wished Ms. Porter well in finding other work. The employer formally discharged Ms. Porter on March 11, 2005.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence establishes that the claimant was discharged for misconduct in connection with her employment. It does not.

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 proof. See Iowa Code section 96.6-2. To establish misconduct in the case of a discharge for failing a drug or alcohol test, the employer must establish that the test was conducted in compliance with Iowa Code section 730.5 or Federal Regulations of the United States Department of Transportation. The employer has not provided any evidence indicating that the test was administered under federal law. The question before the administrative law judge is whether the employer substantially complied with state law.

In Harrison v. EAB, 659 N.W.2d 581 (Iowa 2003), the Supreme Court of Iowa ruled the employer did not substantially comply with the notice requirements of sections 730.5 (7)(i)(1) because the employee was not given written notice of his right to have a second confirmatory test done at his expense and was not given seven days, as required by statute, to respond to the employer's notification. The evidence in this record establishes a similar flaw. The employer's letter of March 8, 2005 instructed the claimant to contact the medical review officer, not the employer, within 24 hours, not seven days. It did not advise the claimant of her right to have the split sample analyzed at a laboratory of her choice. Furthermore, the employer terminated the claimant three days after the date of the letter. These deficiencies closely mirror those found fatal to the employer's case in the Harrison decision. Benefits are allowed.

DECISION:

The unemployment insurance decision dated September 8, 2005, reference 01, is affirmed. The claimant is entitled to receive unemployment insurance benefits, provided she is otherwise eligible.

kkf/kjw